No. 89-601-CFX
Status: GRANTED

Title: Commissioner, Immigration and Naturalization Service, et al., Petitioners
v.
Marie Lucie Jean, et al.

Docketed:
October 13, 1989

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Kurzban,Ira J.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Aug 4 1989 | G | Application (A89-101) to extend the time to file a petition for a writ of certiorari from August 15, 1989 to September 14, 1989, submitted to Justice Kennedy. |
| 2 | Aug 10 1989 | | Application (A89-101) granted by Justice Kennedy extending the time to file until September 14, 1989. |
| 3 | Sep 5 1989 | G | Application (A89-101) to extend further the time to file a petition for a writ of certiorari from September 14, 1989 to October 14, 1989, submitted to Justice Kennedy. |
| 4 | Sep 12 1989 | | Application (A89-101) granted by Justice Kennedy extending the time to file until October 14, 1989. |
| 5 | Oct 13 1989 | G | Petition for writ of certiorari filed. |
| 6 | Nov 15 1989 | | DISTRIBUTED. December 1, 1989 |
| 7 | Nov 17 1989 | X | Brief of respondents Marie L. Jean, et al. in opposition filed. |
| 8 | Nov 21 1989 | X | Reply brief of petitioner Commr. of INS filed. |
| 9 | Nov 29 1989 | | Record requested. |
| 10 | Dec 27 1989 | | Record filed. |
| | | * | Certified copy of original record and proceedings, 4 volmues, boxed, received. |
| 11 | Jan 3 1990 | | REDISTRIBUTED. January 19, 1990 |
| 12 | Jan 22 1990 | | Petition GRANTED. |
| | | | ********** |
| 13 | Jan 23 1990 | | Record filed. |
| | | * | Certified copy of supplemental record, volume 5, received. |
| 14 | Feb 23 1990 | | SET FOR ARGUMENT MONDAY, APRIL 23, 1990. (1ST CASE) |
| 15 | Mar 8 1990 | | Joint appendix filed. |
| 16 | Mar 8 1990 | | Brief of petitioner Commissioner McNary of INS filed. |
| 17 | Mar 30 1990 | | CIRCULATED. |
| 18 | Apr 9 1990 | X | Brief amici curiae of National Immigration Project, et al. filed. |
| 19 | Apr 9 1990 | X | Brief amicus curiae of Natl. Organ. Social Security Claimants Representives filed. |
| 20 | Apr 9 1990 | X | Brief of respondents Marie L. Jean, et al. filed. |
| 21 | Apr 9 1990 | X | Brief amicus curiae of American Immigration Lawyers Association filed. |
| 22 | Apr 16 1990 | X | Reply brief of petitioner Commissioner of INS filed. |
| 23 | Apr 23 1990 | | ARGUED. |

89-601

No.

Supreme Court, U.S.
FILED
OCT 13 1989
JOSEPH F. SPANIOL, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1989

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COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

---

KENNETH W. STARR
*Solicitor General*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
THOMAS W. MERRILL
*Deputy Solicitor General*
HARRIET S. SHAPIRO
*Assistant to the Solicitor General*
MICHAEL JAY SINGER
MARY K. DOYLE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

123 pp

## QUESTION PRESENTED

Whether—in a case where it is determined that the government was not substantially justified on the merits and is therefore liable for fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987)—the government must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

## PARTIES TO THE PROCEEDINGS

Petitioners, who were defendants in the district court and appellants in the court of appeals, are the Commissioner of the Immigration and Naturalization Service; the District Director of INS, District VI; the Assistant District Director for Deportation, INS, District VI; Officer in Charge, Krome Avenue North Detention Facility; the INS; and the Attorney General of the United States. Respondents, who were plaintiffs in the district court and appellees in the court of appeals, are Lucien Louis, Jean Louis Servebien, Pierre Silien, Wilner Luberisse, Job Dessin, Serge Verdieu, Milfort Vilgard, Joel Casimir, and Prophete Talleyrand, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc.*

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* Marie Lucie Jean and Herold Jacques were named as petitioners in an earlier habeas corpus petition, but their names were not included in the second amended class action complaint.



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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No.

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

---

The Solicitor General, on behalf of the Commissioner of the Immigration and Naturalization Service, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 863 F.2d 759. The opinion of the district court (App., *infra*, 46a-99a) is reported at 646 F. Supp. 1300.

## JURISDICTION

The judgment of the court of appeals was entered on December 27, 1988 (App., *infra*, 100a-101a). A petition

for rehearing was denied on May 17, 1989 (App., *infra*, 102a-103a). On August 10, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including September 14, 1989, and on September 12, 1989, he further extended it to and including October 14, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> * * * * *
>
> (2) For the purposes of this subsection—
>
> (A) "fees and other expenses" includes * * * reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)[.]
>
> * * * *
>
> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]



## STATEMENT

1. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987), "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. The Act does not, however, mandate automatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2)(B) (1982 & Supp. V 1987)) that prevails in a civil nontort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987).

2. This attorney's fee dispute arises out of a class action brought in 1981 by respondents, as representatives of certain Haitian aliens detained by the INS[1], to challenge a

[1] The district court certified a class consisting of all Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981, who were applying for entry into the United States and who were presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion had not been entered and who were either: (1) unrepresented by counsel; or (2)

revised parole policy instituted by the Immigration and Naturalization Service in that year. Respondents' complaint, as amended, contained seven counts, each alleging a separate cause of action; Count 2 alleged that the new parole policy constituted a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and that the government's failure to follow APA rulemaking procedures rendered that policy unenforceable. The other counts alleged a number of other constitutional and procedural violations of respondents' rights.[2]

Before trial, the district court dismissed on jurisdictional grounds all of respondents' claims except those based on the APA and the Fifth and the First Amendments. *Louis* v. *Nelson*, 544 F. Supp. 973, 983 n.25 (S.D. Fla. 1982). After a five-week trial, it found respondents' constitutional claims to be without merit. *Id.* at 1001-1004. The district court ruled in favor of respondents on the APA claim, however, concluding that the revised

represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered. *Louis* v. *Nelson*, 544 F. Supp. 1004, 1005, 1009 (S.D. Fla. 1982).

[2] Count 1 challenged the commencement of preliminary interviews of Haitian aliens without the presence of counsel or notice of the right to counsel; Count 3 challenged the failure to advise class members of their procedural rights at exclusion hearings; Count 4 challenged the denial of counsel; Count 5 challenged the denial of public exclusion hearings; Count 6 challenged the denial of the right to apply for political asylum; and Count 7 challenged the lawfulness of the program in its entirety under the equal protection component of the Fifth Amendment's Due Process Clause. *Louis* v. *Meissner*, 532 F. Supp. 881, 883-884 (S.D. Fla. 1982).



parole policy should have been promulgated in accordance with notice-and-comment rulemaking procedures. *Id.* at 993-997.[3]

Petitioners appealed the district court's APA ruling. Respondents cross-appealed, pressing their equal protection and First Amendment claims, as well as the claims that had been dismissed before trial.

A panel of the Eleventh Circuit affirmed the district court's judgment with regard to the APA claim, but with a different rationale.[4] In all other respects, it reversed the district court's post-trial judgment; in addition, it concluded that several of the claims should not have been dismissed before trial and remanded the case for further factual development. *Jean* v. *Nelson*, 711 F.2d 1455 (1983).

[3] The court subsequently declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect". *Louis* v. *Nelson*, 544 F. Supp. 1004, 1006 (S.D. Fla. 1982). Accordingly, the court ordered that all class members in detention be released on parole under an interim plan, subject to certain terms and conditions. *Id.* at 1006-1009.

[4] The district court had relied (544 F. Supp. at 996-997) on criteria enunciated in *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-702 (5th Cir. 1979), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), in rejecting petitioners' argument that the INS policy fit within the "general statement of policy" exception to the APA notice and comment requirement for rulemaking. The panel disagreed with those cases, and enunciated its own basis for affirming the district court's conclusion that no "general statement of policy" was involved here. It also stated, however, that "[i]n all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in a Serbonian Bog. The term itself * * * offers little guidance. * * * The legislative history offers little guidance. * * * The Supreme Court has yet to offer a definitive test." 711 F.2d at 1480 (citations omitted).

The panel opinion was vacated when rehearing en banc was granted, 714 F.2d 96. The en banc court dismissed in part, reversed in part, and remanded with instructions. *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984). All members of the en banc court agreed that the APA claim was moot because petitioners had, subsequent to the district court's decision, promulgated regulations in accordance with the rulemaking provisions of the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations." *Id.* at 962. Accordingly, the en banc court dismissed the government's appeal as to the APA issue and remanded with directions "that the injunctive relief grounded on the claimed APA violation be vacated." *Id.* at 984.

The en banc court held that although the petitioners' parole policy was not subject to a constitutional due process attack, excludable aliens "do have rights * * * to whatever process Congress—and through its regulations and established policies, the Excutive branch—have extended them" (727 F.2d at 984). It accordingly remanded the case for further review under this standard. *Ibid.*

This Court granted respondents' petition for a writ of certiorari, which addressed only the equal protection issue. The Court found it unnecessary to reach that issue because the new regulations promulgated by the INS provided respondents with nondiscriminatory parole consideration—"all they seek to obtain by virtue of their constitutional argument." *Jean* v. *Nelson*, 472 U.S. 846, 855 (1985). The Court therefore affirmed the en banc court's judgment insofar as it remanded the case to the district court for a determination as to whether INS officials were



acting in compliance with the new regulations. On that remand respondents obtained no further relief.

3. On December 6, 1985, after the merits litigation had finally come to a close, the district court found that respondents were entitled to an award of fees, costs and expenses under the Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987). App., *infra*, 88a-99a. Although recognizing that respondents did not prevail on their constitutional claims, the district court found that they were "prevailing parties" for purposes of EAJA because petitioners' appeal of the district court's APA finding was dismissed, and respondents obtained the "two primary goals" (*id.* at 89a-90a) of the litigation—"[petitioners] stopped the accelerated mass exclusion hearings and class members were released from indefinite incarceration" (*id.* at 90a-91a). The district court also found that petitioners' position on the APA issue was without substantial justification in law or fact (*id.* at 92a-95a).

After a hearing devoted to the reasonableness of the hours and the rates claimed, the district court issued a further order establishing the amount of the EAJA award to respondents (App., *infra*, 46a-87a).[5] In determining the numbers of hours reasonably expended in the litigation, the court considered and applied the factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). App., *infra*, 54a-67a. In addition, it concluded that "some award is in order for counsel's efforts in the Supreme Court," and awarded fees for 25% of the hours spent in that portion of the litigation. *Id.* at 69a-70a.

Turning to consideration of the hourly rates to be awarded, the court held that respondents were entitled to

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[5] The appended opinion is a revision of the one originally entered by the court on August 29, 1986. App., *infra*, 46a n.1.

rates in excess of the EAJA statutory cap of $75 an hour because of the cost of living and the limited availability of qualified counsel; it made no attempt to quantify the impact of either of these two factors. App., *infra*, 72a-74a. It then held that respondents were entitled to a 15% enhancement for four reasons: the pro bono publico nature of the case, the vindication of public rights, the emotional pressure on respondents' counsel and the government's litigious posture. *Id.* at 74a-77a. Finally, in awarding fees for the fee litigation, the court specifically relied (*id.* at 84a-85a) on the statement in *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986) that "we * * * decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified."[6] It accordingly did not consider whether the government's position in the fee litigation was substantially justified. In total, the district court awarded respondents more than $1 million, including more than $101,500 for their work on the fee petition. App., *infra*, 85a, 86a-87a.

The Court of appeals affirmed the district court's determination that the government's position was not substantially justified (App., *infra*, 11a-17a),[7] but vacated and

[6] That portion of the *Haitian Refugee Center* opinion was subsequently vacated (*Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986). See App., *infra*, 38a.

[7] Like the district court, the court of appeals reached this conclusion by focusing solely on the government's position on the APA issue. Despite its earlier recognition of the difficulty of this issue (see note 4, *supra*), the court of appeals refused to overturn the district court's finding that the government lacked substantial justification in taking the position that the statement of the new parole policy was not a "rule" subject to APA notice and comment requirements. App., *infra*, 13a-17a.



remanded for a recalculation of the award (*id.* at 41a). The court of appeals found that the district court had erred in awarding fees for respondents' unsuccessful Supreme Court litigation, because "[respondents] did not prevail on any legal issue or obtain any additional relief subsequent to our in banc court's decision." *Id.* at 18a-20a.

The court also disapproved the district court's determination of the appropriate hourly rates. It found, first, that the proper starting point was not with the factors listed in *Johnson* v. *Georgia Highway Express, Inc., supra*, but the prevailing market rates for services of the kind and quality provided. Even if the requested hourly rates did reflect prevailing market rates, "the district court must still find that a cost of living increase or a 'special factor' justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure." App., *infra*, 25a-26a. Here, the district court had failed to explain the basis for its cost of living adjustment in the fee award. The court of appeals then rejected three of the four factors that the district court had relied on—the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel—to justify enhancement of the fee award. The panel majority did, however, conclude that the government's litigiousness in this case might be a special factor which would justify an increased award. *Id.* at 30a-33a. Although the court of appeals concluded that *Pierce* v. *Underwood*, 108 S. Ct. 2541 (1988), precluded consideration of the general level of competence of counsel or "a mere short supply of qualified lawyers willing to take a case at $75 an hour" (App., *infra*, at 28a) as a "special factor" justifying an enhanced hourly rate, it directed the district court to consider, upon remand, whether expertise in immigration law

or fluency in French and Haitian Creole constituted such "special factors". *Id.* at 28a-29a.[8]

Finally, the court of appeals concluded that the district court had not erred in awarding more than $100,000 in fees for work on the fee litigation without considering whether the government's position in that litigation was substantially justified. The court recognized the division in the circuits on this issue (App., *infra,* 38a), but agreed with the approach taken by the Second Circuit in *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702, 707 (1987), and concluded that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees,' " (App., *infra*, 39a-40a). The court expressly reserved the question "whether a 'technical defense' exception to this rule should exist" (*id.* at 41a n.14).[9]

**REASONS FOR GRANTING THE PETITION**

There are several significant errors in the opinion of the court of appeals.[10] We have nevertheless concluded that

[8] The dissent disagreed with the basis for the calculation of the cost of living adjustment, with the conclusion that the government's litigating posture might be a "special factor", and also with the conclusion that competence in immigration law might be such a factor. App., *infra,* 41a-45a.

[9] This reservation apparently referred to the court's prior discussion (App., *infra*, 39a) of *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 214 (1986), noting that in that case, the D.C. Circuit expressly permitted the government to "raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for 'fees for fees' on the ground that the technical defense is substantially justified."

[10] In addition to the "fees for fees" issue presented in this petition, we submit that the court misinterpreted EAJA's provision that no fee award should be made if "the position of the United States was substantially justified" (28 U.S.C. 2412(d)(1)(A) (1982 & Supp. V 1987). Although the United States prevailed on all the issues that were fully litigated in this case, the court below determined that the government's position was not "substantially justified" by focusing solely on the APA issue, which was dismissed as moot by the en banc court of appeals. Instead of giving determinative weight to this single issue, the court should have considered whether the government's *overall* position was reasonable – whether the government was "substantially (*i.e.*, for the most part) justified" (*Pierce* v. *Underwood*, 108 S. Ct. at 2550 n.2).

We also disagree with the court's suggestion that expertise in immigration law might be a "special factor" justifying an award at an hourly rate in excess of the statutory fee cap (cf. *Pierce* v. *Underwood*, 108 S. Ct. at 2554), and that the government's alleged litigiousness in this case might also be such a factor.



only one of those errors – the adoption of a "per se" rule for the award of fees for the fee litigation – merits this Court's attention at this time. There is a conflict in the circuits over the correct standard to be applied in determining whether to award such fees. That conflict warrants resolution by this Court because it is a source of continued litigation in the circuits that have not adopted a position on the issue. Moreover, the incorrect approach chosen by the court of appeals encourages unnecessary fee litigation that wastes the resources not only of the parties, but also of the courts.

1. As the Eleventh Circuit recognized in this case, there is a split among the circuits on the "fees for fees" issue. The Ninth, Eighth, Seventh and Fifth Circuits have refused to award EAJA prevailing parties fees for the fee litigation where the court has determined that the government's position in the fee litigation was substantially justified. *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984); *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d

321, 324 (7th Cir. 1985); *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985).[11]

The Eleventh Circuit in this case, following the lead of the Second Circuit in *Trichilo* v. *Secretary of Health and Human Services*, 823 F.2d 702 (1987), disagreed with this approach and adopted a "per se" rule, holding the government automatically liable for fees for the fee litigation whenever an EAJA award is made. The First Circuit has recently also adopted this position. *McDonald* v. *Secretary of Health and Human Services*, No. 88-2177 (Sept. 7, 1989).[12]

2. Nothing in the language or the legislative history of EAJA indicates that "fees for fees" should be awarded automatically whenever the government's position on the merits portion of the case is found to lack substantial justification. The statute simply provides that fees are to be awarded the prevailing party unless the "position of the United States" was substantially justified (28 U.S.C.

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[11] The Third Circuit suggested a different approach in *Russell* v. *Heckler*, 814 F.2d 148, 155 (1987), vacated on other grounds, 108 S. Ct. 2891 (1988). It stated that where the government's sole argument in the fee litigation is that it was substantially justified on the merits, and the court disagrees, the government will ordinarily be liable for fees for the fee litigation; but if the government's opposition is based on other contentions, the court should not award fees for the fee litigation if the government's position with respect to those issues is substantially justified. The Third Circuit has not had the occasion to adopt this rule in a subsequent opinion.

[12] In *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213 (1986), the District of Columbia Circuit noted that in a previous decision (*Cinciarelli* v. *Reagan*, 729 F.2d 801 (1984)), it had "indicated a preference for the *per se* fee-shifting rule." The *American Academy of Pediatrics* court found it unnecessary to "definitively accept the *per se* rule suggested by *Cinciarelli*," stating that "[we] hold only that a technical defense exception, including at least the defense of untimely filing, should limit any fee-shifting rule." 795 F.2d at 213.



2412(d)(1)(A)); "position of the United States" is defined to include the position taken in the civil action and the action or failure to act upon which the civil action is based (28 U.S.C. 2412(d)(2)(D)). Nothing in the statute refers to the government's position in the fee litigation; there is certainly no suggestion that fees are to be paid for such litigation regardless of substantial justification.

Nor does the legislative history justify the court of appeals' expansive reading of the statute.[13] Congress amended the Act in 1985 to add the definition of the "position of the United States" out of concern that:

> If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions; thereby having the effect of substantially justifying their position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980.

H.R. Rep. No. 120, 99th Cong., 1st Sess. 12 (1985) (citation omitted). That concern does not support a per se "fees for fees" rule. Fee litigation is separate from the merits portion of a case. If the agency conduct was unreasonable, the government will be liable for fees for the merits portion of the case. Similarly, if the government's position on the fees portion of the case is not substantially justified, the government will be held liable for fees for fees. But the "incentive for careful agency action" is in no way dimin-

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[13] Instead, EAJA must be narrowly construed because it is a limited waiver of sovereign immunity.

ished if the government is not required to pay "fees for fees" because its position in that portion of the case is substantially justified.

Indeed, the "per se" rule is inconsistent with the plain language and the purposes of EAJA, since it penalizes the government for raising arguments that are not only substantially justified, but are also correct. Cf. *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983); *Matthews* v. *United States*, 713 F.2d 677, 684 (11th Cir. 1983). EAJA was carefully crafted so that it would not deter the government from taking reasonable positions. H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10-11, 13-14 (1980). It certainly should not be interpreted in a way that would penalize the government for making reasonable—even prevailing—arguments in opposition to any and all fee requests. In this case, for example, the government argued that respondents were not entitled to any compensation for their work before the Supreme Court. The court of appeals agreed. The government also pointed out that the district court had failed to quantify what portion of the increased hourly rate was due to an increase in the cost of living. The appellate court agreed with that contention as well. Finally, the court of appeals agreed with the government that the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel did not constitute "special factors" justifying an enhanced fee award. Notwithstanding the fact that the government prevailed on each of these issues, the court of appeals has required the government to reimburse respondents for the attorney fees they incurred in these losing efforts.

3. The "per se rule" adopted by the court below will also encourage unnecessary fee litigation, thus further burdening the courts with what this Court in *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2548 (1988), recognized as litigation unlikely to result in "law-clarifying benefits".



Prevailing parties will be encouraged to file unreasonable fee requests, since regardless of the merits of such requests, the government will have to bear all the costs of litigating them.[14] Indeed, as the dissent observed in *McDonald* v. *Secretary of Health and Human Services*, slip op. 40 "[t]he more esurient the request, the more likely the government will oppose it; the more heroic the opposition, the more time will reasonably be spent litigating the matter; the more protracted the litigation, the greater the number of hours reasonably expended on it; the more hours spent, the higher the fee award (notwithstanding whatever trimming may be done in the name of 'reasonableness')." No reasonable policy supports such an invitation to meritless litigation; yet that is precisely what the court of appeals' rule of automatic fees for fees does.

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[14] Similarly, the settlement of fee requests will be discouraged. For this reason, the "per se" rule will in fact tend to encourage the sort of "infinite regression of EAJA litigation" that concerned the court below (App., *infra*, 38a, quoting *Cinciarelli* v. *Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984)). In any event, the requirement that the reasonableness of the government's position on the fee request must be independently evaluated is unlikely to result in repeated appeals, since it is scarcely likely that such repeated appeals would be substantially justified. Moreover, the risks of litigation under that standard will encourage the parties to settle their fee disputes on a reasonable basis.

## CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
STUART E. SCHIFFER
*Acting Assistant Attorney General*
THOMAS W. MERRILL
*Deputy Solicitor General*
HARRIET S. SHAPIRO
*Assistant to the Solicitor General*
MICHAEL JAY SINGER
MARY K. DOYLE
*Attorneys*

OCTOBER 1989

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 86-5887

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

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Dec. 27, 1988

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Appeal from the United States District Court
for the Southern District of Florida

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Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

CLARK, Circuit Judge:

In another chapter of what has been a long, complex, and bitterly contested lawsuit, the United States has challenged an award of attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Supplied with the Supreme Court's first EAJA decision, *Pierce v. Underwood*, ____ U.S. ____, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988), we have concluded that the district court did not abuse its discretion in finding that the plaintiffs are entitled to an award of attorney's fees, ex-

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

penses and costs. But because the district court's calculation of the award is inconsistent with certain standards set forth in *Pierce* and other case law, we are vacating its award and remanding the case for a recalculation of the award.

## I. BACKGROUND

### A. *Litigation on the Merits*

The facts concerning this case are well known. *See Louis v. Nelson*, 544 F.Supp. 973 (S.D.Fla.1982) (*Jean I*); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir.1983) (*Jean II*), *vacated by reh'g in banc*, 727 F.2d 957 (11th Cir.1984) (*Jean III*), *aff'd*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (*Jean IV*). For the purposes of the assessing the plaintiffs' right to attorney's fees and costs under the EAJA, we will detail only the nature and substance of their claims, and the results—both judicial and extra-judicial—that they obtained.

The lawsuit began as a challenge to the practice, instituted by the Immigration and Naturalization Service (INS), of holding mass exclusion hearings for the plaintiff class composed of Haitian refugees. It evolved quickly into a broad-based challenge to INS's policy of detaining the class members, during the pendency of their applications for asylum, without any possibility of parole. The complaint filed on June 16, 1981 contained seven counts, four of which were dismissed by the district court on February 24, 1982.[1] Three issues remained for trial: (1) whether the

[1] In the counts dismissed by the district court, the plaintiffs claimed that (1) the defendants (INS officials and the attorney general) had compelled the plaintiffs to appear at preliminary interviews in which the plaintiffs were not advised of their right to counsel nor permitted to be accompanied by counsel, all in violation of the Administrative Procedure Act, 5 U.S.C. § 555(b); (2) the failure of the defendants to notify class members of procedural rights attendant to their exclusions hearings violated INS's own regulations, the Immigration and Nationality Act (INA), 8 U.S.C. § 1362, and the Fifth Amendment's Due Process Clause; (3) pursuant to INS regulations, the class members were entitled to individualized, public exclusion hearing; and (4) the defendants were denying the plaintiffs the right to apply for political asylum, in violation of the Due Process Clause, INA § 1158, and INS regulations.



defendants' departure from the established policy of paroling undocumented aliens, without formal rulemaking, violated the Administrative Procedure Act (APA), 5 U.S.C. § 553; (2) whether the unique manner in which Haitian refugees were treated violated their right to equal protection under the Fifth Amendment, since it amounted to a classification based on race and national origin; and (3) whether the class members were unlawfully denied their Fifth Amendment rights of access to legal counsel, relatives, and friends in the Miami community.

After a six-week trial, the district court ruled that INS had violated the APA by failing to engage in formal rulemaking before revising its policy of paroling applicants for asylum. *Jean I*, 544 F.Supp. at 993-97, 1003-04. Ten days later, the court declared by separate order that the detention policy was void, and ordered the release of the plaintiff class pursuant to a plan detailed in the order. *Louis v. Nelson*, 544 F.Supp. 1004, 1006-09 (S.D.Fla. 1982). The court also ruled that there was insufficient evidence to support the plaintiffs' equal protection claim. *Jean I*, 544 F.Supp. at 997-1002, 1004. The court declined to rule on the access claim, "ostensibly because the issue was mooted by the release order." *Jean II*, 711 F.2d at 1464.

A panel of this court affirmed the district court's APA ruling, concluding that the policy of detaining undocumented Haitian refugees constituted a new "rule" that had

been formulated without following APA rulemaking procedures. *Id.* at 1474-83. The panel reversed the district court's holding that the plaintiffs had failed to make out a case of intentional discrimination. *Id.* at 1483-1502. The panel also reached the merits of the claim, dismissed by the district court, that the class members had been denied a right to receive notification that they were entitled to apply for asylum. *Id.* at 1507-08. Finally, the panel acknowledged that the plaintiffs' access claim was not moot because of the possibility that INS would revoke class members' parole; it ordered a remand to determine whether the government's access restrictions were unlawful. *Id.* at 1508-09.

Sitting in banc,[2] this court held that the APA claim as originally presented to the district court had become moot because the class members were no longer subject to detention, unless such detention was pursuant to new regulations promulgated by INS subsequent to the district court's decision in *Jean I*. These regulations, *see* 8 C.F.R. § 212.5, require INS to make parole determinations without regard to an alien's race or natural origin; thus, we dismissed the appeal as to the APA claim. *Jean III*, 727 F.2d at 962.[3] As for the equal protection claim, the court

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[2] Pursuant to our rules, the granting of rehearing in banc vacated the panel opinion. 11th Cir.R. 35-11. The in banc court, however, adopted the panel and district court statements of the facts. *See Jean III*, 727 F.2d at 962.

[3] Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented had been rendered moot. The validity of these new regulations is not before this court, and we express no opinion in this regard. We accordingly dismiss the appeal as to [the APA claim] and remand with instructions that this part of the district court's judgment be vacated.

*Jean III*, 727 F.2d at 962.



held that excludable aliens have no equal protection rights with regard to the processing of their asylum or admission applications or INS determinations that they should not be paroled. The claim was nonetheless remanded to determine whether low-level INS officials were discriminating against plaintiffs in violation of instructions from their superiors. *Id.* at 967-79. The court also held that the Refugee Act of 1980 does not create a constitutionally protectable interest in receiving notice of the right to petition for asylum. *Id.* at 979-80. Finally, the court held that the access claim was not moot and remanded it to the district court for full consideration.

In *Jean IV*, the Supreme Court affirmed the judment of our in banc court, but explained that we should not have reached the merits of the constitutional question. In arguing the case before the Court, the Solicitor General conceded that because the statute granting parole authority to the attorney general, 8 U.S.C. § 1182(d)(5)(A), and 8 C.F.R. § 212.5, did not include race or natural origin as factors relevant to a parole determination, INS was prohibited from considering these factors.[4] In light of the

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[4] Respondents [the government defendants] concede that the INS parole discretion under the statute and these regulations, while exceedingly broad, does not extend to considerations of race or national origin. Respondent's position can best be seen in this colloquy from oral argument:

> "Question: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining that the regulations do not constitute any kind of discrimination against these people, and . . . your agents in the fields are inhibited by your own regulations from doing what you say the Constitution would permit you to do."
> "Solicitor General: That's correct."

*Jean IV*, 105 S.Ct. at 2997 (quoting transcript of oral argument before the Supreme Court).

neutral quality of the criteria contained in the new regulation, the Court affirmed our in banc court's judgment "insofar as it remanded to the District Court for a determination whether the INS officials are observing this limit upon their broad statutory discretion to deny parole to class members in detention." *Jean IV*, 105 S.Ct. at 2998. The question to be resolved on remand was whether INS was properly following the statutory and regulatory framework in making parole determinations. *Id.*

### B. *Attorney's Fee Litigation*

The Supreme Court has admonished the courts to ensure that a request for attorney's fees does "not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983). Contests over EAJA fees and expenses do not typically threaten to upset this ideal.[5] Yet a case of this magnitude and complexity, in which approximately 45 lawyers have periodically participated,[6] can be expected to place substantial pressure on the norm. After a hearing consuming five days, and a review by the district court of "hundreds of pages of affidavits," the court awarded $950,944.87 in attorney's fees to seven individual attorneys and one law

[5] The overwhelming majority of EAJA awards in fiscal year 1986-87 were against the Department of Health and Human Services (351 of 387 awards). The average award was $2,379. *Pierce v. Underwood*, ___ U.S. ___, 108 S.Ct. 2541, 2549, 101 L.Ed.2d 490 (1988) (citing Annual Report of the Director of the Administrative Office of the U.S. Courts, Fees and Expenses Awarded Under the Equal Access to Justice Act pp. 99-100, Table 29 (1987)).

[6] "The government had, at one time or another, thirty different attorneys working on the case. Naturally, the Plaintiffs had to respond in kind with their own forces, although, the Court notes that Plaintiffs had approximately one half the number of counsel." *Louis v. Nelson*, 646 F.Supp. 1300, 1308-09 (S.D.Fla.1986).



firm, $152,169.33 in costs and expenses to two individual attorneys, one firm and the Haitian Refugee Center. It also awarded fees, expenses and costs for the attorney's fee litigation itself.

The district court's rulings and award are contained in two deliberate and detailed orders, the first assessing the plaintiff's entitled to fees, the second explaining the court's calculations.[7] Because the government has contested virtually every aspect of the district court's legal rulings and calculations, and because there is merit to some of the government's contentions, we will closely analyze the components of these orders.

## II. QUALIFYING FOR EAJA FEES

The EAJA provides that

> a court shall award to a prevailing party . . . fees and other expenses, . . . incurred by that party in any civil action, . . . brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A). As the district court noted, there are three predicate findings to an award of EAJA fees and expenses: (1) the litigant opposing the United States must be a "prevailing party"; (2) the government's position must not have been substantially justified; and (3) there must be no circumstances that make an award

[7] The court's order entitled "Corrected Memorandum Opinion and Order on Attorney's Fees, Costs, and Expenses" appears at 646 F.Supp. 1300 (S.D.Fla.1986). This opinion details the manner in which the award was calculated. An earlier order discussing the plaintiffs' entitlement to fees and costs appears as an appendix to this memorandum opinion. *See id.* at 1323-38.

against the government unjust. 646 F.Supp. at 1324. Only the first two of these issues concern us because the United States does not maintain that there are special circumstances that make the EAJA award unjust.

**A. *Are the Plaintiffs Prevailing Parties?***

Our circuit employs the same test to determine whether an applicant for EAJA fees is a "prevailing party" as we use to resolve "prevailing party" eligibility for attorney's fees under 42 U.S.C. § 1988:

> The prevailing party test is "whether he or she has received substantially the relief requested *or* has been successful on the central issue," *Watkins v. Mobile Housing Board*, 632 F.2d 565, 567 (5th Cir. Unit B 1980), *or*, stated another way, whether "plaintiffs' lawsuit was a catalyst motivating defendants to provide the primary relief sought in a manner desired by litigation." *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir.1981).

*Martin v. Heckler*, 773 F.2d 1145, 1149 (11th Cir.1985) (in banc) (emphasis added).[8]

The United States contends that the plaintiffs did not prevail under this standard. The government's position appears to be that the "real" issue in this case was the equal protection claim, on which the plaintiffs failed to secure relief. The government considers the APA claim, on which the plaintiffs unquestionably prevailed before the district court, to be insufficient to support an attorney's fee award since we later held it was moot, and ordered that the resulting injunctive relief be vacated. There are two responses to the government's position.[9]

[8] For an indication in the EAJA's legislative history that Congress intended to give the term prevailing party the same meaning it has in other fee-shifting statutes, see H.R.Rep. 1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S. Code Cong. & Admin.News 4984, 4990.



First, it is well established that a party need not obtain relief on every claim or legal theory it propounds in order to be considered "prevailing" under a fee-shifting statute. In the context of the Civil Rights Attorney's Fees Act (42 U.S.C. § 1988) (section 1988), the Supreme Court has made clear that a plaintiff is "prevailing' if he proves "his entitlement to *some* relief on the *merits* of his claims, either in the trial court or on appeal." *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980) (per curiam) (emphasis added). He or she need not prevail on all legal issues. *Id.* Our court has applied these standards in the EAJA context. *See Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1495-96 (11th Cir.) (interim EAJA award where plaintifs prevailed on a central issue), *vacated in part on other grounds*, 804 F.2d 1573 (11th Cir.1986); *Ray v. Florida Cabinet*, 845 F.2d 311, 313 (11th Cir.1988).

Second, our in banc court has held that the mooting of a lawsuit by a defendant's favorable remedial action does not necessarily deprive a plaintiff of "prevailing party" status. *Martin*, 773 F.2d at 1149 (citing *Fields v. City of*

[9] At oral argument, counsel for the United States conceded that the plaintiffs were prevailing parties with regard to the APA claim. We elaborate on the meaning of the term "prevailing party" to explain why prevailing on this issue was sufficient to make the plaintiffs prevailing parties with regard to the entire lawsuit.

> The government also points to the most recent decision in this action, *Jean v. Nelson*, 854 F.2d 405 (11th Cir.1988), as support for its argument that the plaintiffs did not "prevail." In this opinion we instruct the district court to vacate all remaining injunctive relief in favor of the plaintiffs in accordance with our previous *in banc* decision. This new decision adds nothing to the posture of this case.

*Tarpon Springs*, 721 F.2d 318, 321 (11th Cir.1983) (per curiam)); *Doe v. Busbee*, 684 F.2d 1375, 1379 (11th Cir.1982)). As we said in *Doe*, "a party may be considered to be 'prevailing' if the litigation successfully terminated by . . . [a] mooting of the case where the plaintiff has vindicated his right." 684 F.2d at 1379, *quoted in Martin*, 773 F.2d at 1149. We often describe this class of cases as "catalysts." In these cases, "parties are prevailing if 'their lawsuit was a significant catalytic factor in achieving the primary relief sought through litigation despite failure to obtain formal judicial relief[,]' or 'if their lawsuit is a substantial factor or a significant catalyst in motivating the defendants to end their [unlawful] behavior.' " *Doe*, 684 F.2d at 1380 (citations omitted).

We do not regard the mooting of the plaintiffs' APA claim as extinguishing their legal victory for purposes of attorney's fees. As the district court noted, the plaintiffs' objectives were (1) "to stop the mass exclusion hearings which were being held without counsel" and (2) "to obtain the release from detention of class members pending the determination of their political asylum applications." 646 F.Supp. at 1305.

As to the first of these objectives, the district court explained that

> shortly after this case was filed the government conceded that the exclusion orders entered at such hearing were invalid and therefore said orders were vacated.

646 F.Supp. at 1324 n. 2. Under these circumstances, the district court could properly conclude that the plaintiffs "were the prevailing party on this aspect of the case." *Id.*

As to the second of these objectives, it is undisputed that the plaintiffs' lawsuit secured their release; some were returned to detention but only after INS promulgated new



regulations. This is apparent from our in banc court's discussion of the mootness issue:

> After the district court rendered its decision, the government promulgated new regulations in accordance with the APA. *See* 8 C.F.R. § 212.5 (1982). At oral argument before this court counsel for petitioners stated that one hundred or more class members are currently being held in detention, but these detainees either had their parole revoked . . . , or arrived in this country after the government's promulgation of its new regulations. *Because the government is no longer detaining any class members except pursuant to the new regulations, the APA issue as originally presented has been rendered moot.*

727 F.2d at 962 (emphasis added). Thus, the claim became moot because the plaintiffs had been released from detention and could not again be detained unless pursuant to duly promulgated regulations regarding parole. Under these circumstances, the district court was authorized to conclude that the plaintiffs were EAJA prevailing parties.

### B. *Was the Position of the United States Substantially Justified?*

In *Pierce*, the Supreme Court held that appellate review of the question whether the United States' position is "substantially justified," is subject to an abuse of discretion standard. 108 S.Ct. at 2546-49; *see also Haitian Refugee Center*, 791 F.2d at 1496; *National Treasury Employees' Union v. IRS*, 735 F.2d 1277, 1278 (11th Cir.1984); *White v. United States*, 740 F.2d 836, 839 (11th Cir.1984); *Ashburn v. United States*, 740 F.2d 843, 846 (11th Cir.1984).

As the Court explained, this question is one which the district courts are " 'better positioned' " to decide. 108 S.Ct. at 2547 (citation omitted).

> To begin with, some of the elements that bears upon whether the Government's position "*was* substantially

justified" may be known only to the district court. Not infrequently, the question will turn upon not merely what was the law, but what was the evidence regarding the facts. By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record, into such matters as whether particular evidence was worthy of being relied upon, or whether critical facts could easily have been verified by the Government. Moreover, even where the district judge's full knowledge of the factual setting can be acquired by the appellate court, that acquisition will often come at unusual expense, requiring the court to undertake the unaccustomed task of reviewing the entire record, not just to determine whether there existed the usual minimum support for the merits determination made by the fact-finder below, but to determine whether urging of the opposite merits determination was substantially justified.

*Id.*

The second standard established by the Court in *Pierce* is the meaning of the term "substantially justified." The Court agreed that the standard of "reasonableness" adopted by the overwhelming majority of circuit courts was the proper one. Thus, to be substantially justified, the United States' position must have a "reasonable basis both in law and fact." 108 S.Ct. at 2550 (citing *Ashburn*, 740 F.2d at 850) (other citations omitted). *See also United States v. Certain Real Estate Property*, 838 F.2d 1558, 1561 (11th Cir.1988); *Stratton v. Bowen*, 827 F.2d 1447, 1449 (11th Cir.1987); *Haitian Refugee Center*, 791 F.2d at 1497.[10]

[10] In an alternative formulation, the Court said that "reasonably justified" also means " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." 108 S.Ct. at 2550. The Court rejected the suggestion, made without elaboration by this court, that the test for reasonableness under the EAJA "is more than mere reasonableness." *Id.* at 2550-51. *See Haitian Refugee Center*, 791 F.2d at 1497; *Stratton*, 827 F.2d at 1449 & n. 3; *Certain Real Estate*, 838 F.2d at 1561 n. 6.



The *Pierce* court did not fix any precise guidelines for assessing a district court's discretionary review of the reasonableness of the government's position. Factors considered, but held not individually dispositive on the facts in *Pierce*, included: (1) the state at which the ligation was resolved; (2) views expressed by other courts on the merits; and (3) the legal merits of the government's position. 108 S.Ct. at 2551-53. Following the D.C. Circuit, our court has also suggested that the following additional factors assist in the reasonableness inquiry: (1) the clarity of the governing law; (2) the foreseeable length and complexity of the litigation; and (3) the consistency of the government's position. *Haitian Refugee Center*, 791 F.2d at 1497 (citing *Spencer v. NLRB*, 712 F.2d 539, 559-60 (D.C.Cir.1983)). Of course, these guideposts are not intended to be an exhaustive list of all the factors a district court, acting in its discretion, may undertake to review. *Id.*

In disputing the district court's conclusion on the question of substantial justification, the government argues that the district court simply erred with respect to the APA in *Jean I*. Because the questions of law were at least "unsettled," the government contends that it was substantially justified.[11] The government is asking, in essence,

[11] The government's posture is succinctly stated in its brief: "The government presented [to the district court] compelling, and in our view, correct arguments that its change in parole practice either did not amount to a 'rule' within the meaning of the APA, or . . that it fell within three exceptions to the APA 'notice and comment' procedure requirements." Brief for the United States at 25.

that we reweigh the merits of its defense on the APA claim. Two things counsel against such a course. First, this would put us in the position of assessing legal questions that are not before us on the merits. The Supreme Court has explained that under circumstances such as this, an abstract discussion of the law is unwise. Where circuit law is unsettled,

> A ruling that the Government was not substantially justified in believing it to be thus-and-so would (unless there is some reason to think it has changed since) effectively establish the circuit law in a most peculiar, second-handed fashion.

*Pierce*, 108 S.Ct. at 2548. Certain cases will require an appellate court to review the content of the government's legal arguments to determine whether it was substantially justified. *Pierce* was such a case because it focused purely on questions of law. Under these circumstances, it would be useful to examine, for example, the weight of authority on the contested questions; in *Pierce,* the Court conducted such a review. As we will demonstrate, such a review is not necessary in this case.

The second and more important reason for not reopening the merits in this case is that there are sufficient legal and factual indicia upon which the district court relied to support the district court's conclusion that the government's position was not substantially justified.

First, the district court placed particular emphasis on a memorandum that acting General Counsel for INS prepared for the service in early 1981. The memorandum summarized the legal requirements applicable to the defendants' detention policy and mass exclusion hearings. It explained that " '[a]ny change in regulation which takes rights or privileges away from aliens will most likely require a 60-day notice and comment period, and a 30-day



delayed effective date. . . .' " 646 F.Supp. at 1326. The district court viewed the defendants' failure to follow this advice as knowing and willful. The court quoted its own review of the evidence on this point in the opinion on the merits:

> "[The defendants] admitted to the Court that they made a conscious effort not to promulgate a rule pursuant to the [APA]. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens. . . ."

646 F.Supp. at 1326 (citation omitted).

In light of the fact that two district judges in the Southern District of Florida had held that APA procedures applied to changes in INS policy toward Haitian refugees, *Sannon* v. *United States,* 460 F.Supp. 458, 466-67 (S.D.Fla.1978), *remanded to be vacated as moot,* 631 F.2d 1247 (5th Cir.1980); *National Council of Churches v. Egan,* No. 79-2959-Civ-HOEVELER (S.D. Fla. Aug. 3, 1979), the district court concluded that the government's position was unreasonable.

We agree with the government that these two cases, standing alone, would not be dispositive of the reasonableness of its position. Sometimes legal authority against the government on a given legal position will build to such a point that it will be difficult to maintain that the government's continued adherence to that position is reasonable. It will seldom be the case, however, that two district court decisions—even if they appear in the same district in which the relevant case is being litigated—will raise such an obstacle. The government must be permitted to make some strategic choices. It must have the oppor-

tunity to make good faith challenges to legal authority with which it reasonably disagrees.

The problem for the government in this case is that INS's acting General Counsel cited one of these district court decisions in forming his opinion that APA procedures were to be followed before INS could substantially alter its detention and parole policies. *Cf. Sannon,* 460 F.Supp. at 466. While the *existence* of this decision is not dispositive, the acting General Counsel's reliance on it is highly significant. The important fact for the district court was that the defendants willfully ignored the advice of counsel. The government's only real response to this point is that the memorandum authored by INS's counsel refers to "regulations," and, impliedly, not to rules. Reply Brief for the United States at 9 n. 8. Of course, the district court held that INS change in policy was a "substantive *rule*" subject to APA rulemaking requirements. 544 F.Supp. at 997. If the government is suggesting that it did not ignore the advice of counsel because the memorandum refers to "regulations" and not "rules," this argument is patently frivolous. *See, e.g.,* K.C. Davis, *Administrative Law Text* § 5.01 at 123 (3d ed. 1972) ("regulation [is] a term used interchangeably with rule").

We conclude that the district court could properly consider the defendants' failure to follow the advice of counsel unreasonable. *Cf. Hudson v. Secretary of Health and Human Services,* 839 F.2d 1453, 1456-57 (11th Cir.1988) (reversing district court finding of substantial justification where agency secretary failed to follow agency regulation).

The district court also explained that the government behaved unreasonably in repeatedly denying—early in the lawsuit—that it had developed any new policy toward Haitians. It claimed instead that "district directors still had complete discretionary authority to parole individuals or,



alternatively, that the district directors were merely enforcing the statute." 646 F.Supp. at 1326. According to the district court,

> It was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures. Since that plaintiffs had consistently maintained that there was a detention policy, the defendants' unreasonable factual position unnecessarily prolonged the litigation of this matter.

*Id.* Although the government challenges this finding, we conclude that it is supported in the record. The parties' joint pretrial stipulation lists as a *factual* issue for trial the question whether "defendants changed their policy of regularly releasing Haitians to a policy of detention without parole." Given the district court's unique familiarity with the historical consistency of the government's factual position, we conclude that it did not abuse its discretion in finding that the government unreasonably protracted the litigation by failing to acknowledge a change in its parole policy. *See Haitian Refugee Center,* 791 F.2d at 1497.

### III. AMOUNT OF THE AWARD

Although we have concluded that the district court acted within its discretion in making an EAJA award, there remains the question whether the amount of the award was proper. With regard to attorney's fees, the government challenges both the number of reimbursable hours and the hourly rates used by the district court in making its award. The government also challenges the award of costs and expenses, and the award of "fees for fees." In reviewing the district court's calculations, we are

again bound to apply an abuse-of-discretion standard. *Pierce*, 108 S.Ct. at 2553 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); *Cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560-61, 106 S.Ct. 3088, 3096, 92 L.Ed.2d 439 (1986)).

**A.** ***Reimbursable Hours***

The plaintiffs' attorney prepared documents indicating that they had spent 11,261.95 reimbursable hours working on this lawsuit. In accordance with earlier guidance given by the district court, the attorneys subtracted a certain number of hours (467.4) from the total for work done on the equal protection claim and reduced by sixty percent the number of hours attributable to their work on the case before the Supreme Court (resulting in a further reduction of 1,604.31 hours). This left a total of 9,190.24 hours for which the attorneys sought compensation. The district court concluded that the reduction of hours for equal protection work was too low and reduced the total hour figure by an additional fifteen percent. It also concluded that the attorneys could be compensated for only twenty-five percent of the hours spent "at the Supreme Court level." 646 F.Supp. at 1315. This left a total 5,756.84 hours the district court found to be reimbursable. The government has attacked this figure on several grounds.

**1. Supreme Court Litigation**

The district court awarded compensation for twenty-five percent of the hours spent litigating the case before the Supreme Court. The only issue before that Court was the merits of the plaintiffs' equal protection claim which was rejected by this court sitting in banc. The Supreme Court *affirmed* our in banc court's judgment, but held



that we should not have reached the merits of the constitutional issue. Normally, a prevailing party is entitled to attorney's fees for work done on appeal. *See. e.g., Hutto v. Finney*, 437 U.S. 678, 693-700, 98 S.Ct. 2565, 2574-78, 57 L.Ed.2d 522 (1978) (section 1988); *O'Donnel v. Georgia Osteopathic Hospital, Inc.*, 748 F.2d 1543, 1553 (11th Cir. 1984) (attorney's fees under Fair Labor Standards Act). But that party must also *prevail on appeal* to qualify for appellate attorney's fees. *See. e.g., Bonner v. Coughlin*, 657 F.2d 931, 935-36 (7th Cir. 1981) (section 1988). On its face, the Supreme Court's judgment provides no basis for an award of EAJA fees because there is no question that the plaintiffs did *not* prevail in the Supreme Court.

The district court, however, found that the plaintiffs were entitled to fees for their appeal to the Supreme Court because the government had changed its legal position in that court. According to the district court, the government acknowledged for the first time, in the Supreme Court, that INS regulations prohibited it from using nationality as a factor in making parole decisions. The district court found that "if the government had argued at the District Court and Eleventh Circuit levels the position it took in the Supreme Court, the constitutional claims would not have needed to be litigated." 646 F.Supp. at 1314. This, the district court concluded, provided a basis for EAJA fees for the work performed before the Supreme Court. Assuming the accuracy of the district court's finding regarding a change in the government's position, we nonetheless conclude that the plaintiffs are not entitled to attorney's fees for the Supreme Court litigation. The plaintiffs were seeking a declaration by the Supreme Court that the Constitution prohibits INS from considering race and national origin in making parole decisions. The Court did not reach the question because of the government's concession that 8 C.F.R. § 212.5 is facially a neutral regulation.

Even though the Court found that our in banc court should not have reached the constitutional issue, it did not vacate our opinion; instead, it affirmed our remand to the district court.

The plaintiffs argue that even though the Supreme Court affirmed our in banc court's judgment, they were in fact victorious because the result was a judicial declaration that INS could not discriminate in making parole decisions. We reject this argument for the simple reason that the plaintiffs did not prevail on any legal issue or obtain any additional relief subsequent to our in banc court's decision. We therefore conclude that the district court abused its discretion in compensating them for a portion of the expense of litigating the case at that level. *Cf. Institutionalized Juveniles v. Secretary of Public Welfare,* 758 F.2d 897, 920 (3d Cir.1985) (ordering disallowance of all hours spent litigating case "after the date on which plaintiffs received their last benefit from the defendants"); *Clark v. City of Los Angeles,* 803 F.2d 987, 993 (9th Cir.1986) (no attorney's fees for appellate work when "nothing associated with the appeal contributed to [the] favorable result achieved by litigation'. On remand, in recalculating the EAJA award, the district court shall exclude any hours spent on Supreme Court litigation.

**2. Unsuccessful Claims**

In *Hensley v. Eckerhart,* the Supreme Court held that an award of attorney's fees should be commensurate with the degree of a prevailing party's success. The principles adduced in *Hensley* are generally applicable here:

> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories. In such a suit, . . . counsel's work on one claim will be unrelated to his work on another claim. Accordingly, work on an unsuccessful claim cannot be deemed to have been "expended in pursuit of the ultimate result achieved."
> . . .
>
> * * * * *
>
> In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff had obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious

counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained.

• • • • •

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

461 U.S. at 434-37, 103 S.Ct. at 1940-41 (footnotes and citations omitted).

Having reviewed the district court's approach to evaluating the degree of the plaintiff's success, we conclude that it acted within its discretion and followed generally the Supreme Court's guidance in *Hensley*. It first directed counsel to excise from its fee request those hours spent litigating the equal protection issue. After finding counsel's estimates of the time spent exclusively on this issue "too low," the district court explained its calculation as follows:

> By the Court's estimate, forty percent (40%) of counsel's time was spent on clearly non-equal protection matters. Perhaps sixty percent (60%) . . . was spent on interrelated matters; an insignificant portion of that time was spent on exclusively on equal protection issues. Of the 60% spent on commingled material, the Court estimates that approximately 25% of that time was spent on equal protection issues. Thus, a reduction, of 15% from the total number of hours is in order.

646 F.Supp. at 1315. Here, the "trial court correctly recognized that the fee award should exclude the time



spent on [the] unsuccessful claim[] except to the extent that such time overlapped with related successful claims." *Trezevant v. City of Tampa*, 741 F.2d 336, 341 (11th Cir.1984).

The government argues that further reductions were in order because the factual overlap between the APA and equal protection claims were less substantial than the district court found. The government has provided us with no basis, however, to discern the degree to which it believes the district court abused its discretion. In contrast, the plaintiffs have supplied us with numerous citations to the record from the attorney's fees proceedings which indicate that the district court had adequate information to support a finding that the legal and factual issues did overlap substantially. The government would also have us order a reduction of the total hour figure on the ground that the plaintiffs obtained "limited" success. As we explained above, we do not think this case is one in which the victory secured was merely technical or formalistic. The plaintiffs obtained the relief they sought in their lawsuit, although not in the form of a declaration that the government had violated the Constitution. If the hours spent litigating the constitutional issues were properly deducted by the district court, there is no reason to further reduce the award.

#### 3. Documentation and Duplication of Effort

Given the detailed record in the fee proceedings, we also reject the government's contention that the attorney's fees requests were not supported by sufficient documentation. The government's principal complaint in this regard is that several of the fee applications were in part the product of "reconstructed" time records. Recently, a number of courts have announced *prospective* rules requiring the filing of contemporaneous records to support an application

of attorney's fees. *See Grendel's Den, Inc. v Larkin,* 749 F.2d 945, 952 (1st Cir.1984); *Ramos v. Lamm,* 713 F.2d 546, 553 (10th Cir.1983); *New York State Association for Retarded Children, Inc. v. Carey,* 711 F.2d 1136, 1147 (2d Cir.1983). Our court, however, has held that contemporaneous time records are not indispensable where there is other reliable evidence to support a claim for attorney's fees. *Johnson v. University College,* 706 F.2d 1205, 1207 (11th Cir.), *cert. denied,* 464 U.S. 994, 104 S.Ct. 489, 78 L.Ed.2d 684 (1983); *see also Dennis v. Warren,* 779 F.2d 245, 249 (5th Cir.1985); *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465, 1473 (9th Cir.1983). The government has pointed to no particular fee record considered by the district court which was so unreliable as to require that the district court reject it as a basis for part of the award. We find nothing to indicate that the district court abused its discretion in relying in part on reconstructed time records.

We likewise reject the government's contention that counsels' hours were subject to reduction as a result of unnecessary duplication of their efforts. The government asserts that lead counsel in Miami failed to oversee and coordinate the work performed by New York co-counsel and that this resulted in unnecessary duplication of attorney effort. The district court carefully considered the question of undue duplication and found credible counsels' representations that they had "purged" their time sheets of unnecessary duplication. 646 F.Supp. at 1314. Our court has recognized that the retention of multiple counsel in complex cases is "understandable and not a ground for reducing the hours claimed" because "[t]he use in involved litigation of a team of attorneys who divide up the work is common for both plaintiff and defense work." While duplication of effort is a proper ground for reducing a fee award, "a reduction is warranted only if the attorneys are *unreasonably* doing the *same* work." *Johnson,* 706 F.2d at 1208. Again, the government has pointed to no specific instances in which counsels' work was unreasonably duplicative. We find that the district court did not abuse its discretion in this regard.



**B.** ***Hourly Rates***

In arriving at its attorney's fee figures, the district court began by considering the factors enumerated by this court in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir.1974). The *Johnson* factors, first developed in the Title VII context, constitute one widely accepted mechanism for ,calculating attorney's fees. Because many of the *Johnson* factors are subsumed into the initial calculation of an attorney's fees lodestar (reimbursable hour multiplied by hourly rate), the Supreme Court has expressed some criticism of the *Johnson* approach in dicta. *See Hensley v. Eckerhart,* 461 U.S. at 435 n. 9, 103 S.Ct at 1940 n. 9. Nonetheless, this court has held that the factors enumerated in *Johnson* are to be considered in calculating EAJA fees. *See Florida Suncoast Villas, Inc. v. United States,* 776 F.2d 974, 975 (11th Cir.1985) (*Johnson* factors play a role in arriving at reasonable EAJA fee).

The Supreme Court's *Pierce* opinion has led us to reappraise this approach, and focus instead on the language of the Act. The EAJA provides that "fees awarded . . . shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the pro-

ceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). As the statute indicates, a court's starting point should be not the *Johnson* factors but the "prevailing market rates" for services of like quality and kind. Market rates for legal services being what they are, these rates will exceed the EAJA's $75 cap in many cases. But this fact alone does not authorize a court to make an upward adjustment in hourly rates. As the Court explained in *Pierce,* the EAJA's special factor formulation "suggests Congress thought that $75 was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." 108 S.Ct. at 2554.

On remand, the district court must first determine the prevailing market rates for services of the kind and quality provided. This inquiry will typically focus on affidavits or testimony of similarly situated practitioners, who are uniquely qualified to express opinions as to "what the market will bear." The fee requests in this case ranged from $40 per hour for paralegal time to $175 per hour for experienced counsel. If these requests accurately reflect prevailing market rates, the district court must still find that a cost of living increase or a "special factor" justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure. *See, e.g., Hyatt v. Heckler,* 807 F.2d 376, 382-83 (4th Cir.1986) (although expert testimony proved that prevailing market rate was $125, district court properly reduced rate to $75), *cert. denied,* ___ U.S. ___, 108 S.Ct. 79, 98 L.Ed.2d 41 (1987).

**1. Cost of Living**

In its EAJA award, the district court cited the statutory cost of living increase permitted by the EAJA as a ground for upward adjustment. The court failed, however, to specify in dollar amounts the impact of this factor in



reaching its overall award. A case of this duration and complexity will make it difficult to make cost of living adjustments with absolute precision. Nonetheless, a court should describe mathematically the basis of all cost of living adjustments under the Act. On remand, the district court shall quantify and explain all cost of living adjustments in favor of each of the plaintiffs' attorneys.

We consider one more question regarding cost of living adjustments. The 1985 enactment of the EAJA contains the same $75 hourly figure found in the original, 1980 version of the Act. Recently, a question has arisen as to whether Congress intended to "restart the clock" on cost of living adjustments by retaining the $75 cap. One circuit court has so held. *See Chipman v. Secretary of Health & Human Services,* 781 F.2d 545, 547 (6th Cir. 1986) (given retention of $75 figure, court does not abuse discretion in failing to make adjustment for pre-1985 services). The government has urged us to adopt this position and hold that no cost of living adjustment can be made for legal services performed prior to the effective date of the 1985 version of the Act. Instead, we join the growing number of circuit courts which have held that the EAJA's 1985 reenactment does not bar cost of living adjustments for services rendered prior to 1985. *See Trichilo v. Secretary of Health & Human Services,* 823 F.2d 702, 706-07 (2d Cir.1987); *Allen v. Bowen,* 821 F.2d 963, 967 (3d Cir.1987); *Sierra Club v. Secretary of the Army,* 820 F.2d 513, 520-23 (1st Cir.1987); *Hirschey v. FERC,* 777 F.2d 1, 5 (D.C.Cir.1985).

**2. Special Factors**

The district court adjusted the hourly rates of plaintiffs' counsel on the basis of the only "special factor" named in the EAJA, "the limited availability of qualified counsel."

In *Pierce,* the Supreme Court gave this phrase a rather limited construction in light of the EAJA's $75 cap. The Court explained that

> "limited availability of qualified attorneys for the proceedings involved" must refer to attorneys "qualified for the proceedings" in some specialized sense, rather than just in their general legal competence. We think it refers to attorneys having *some distinctive knowledge or specialized skill* needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language. Where such qualifications are *necessary* and can be obtained only at rates in excess of the $75 cap, reimbursement above that limit is allowed.

108 S.Ct. at 2554 (emphasis added). The Court's view is clear: a mere short supply of qualified lawyers willing to take a case for $75 per hour or less does not mean that there is a "limited availability of qualified counsel."

In addition, where highly skilled lawyers or lawyers with the best reputations participate, this is not a factor to be considered once it is established that market rates for their services exceed $75. Under such circumstances only a special skill authorizes an upward adjustment of hourly rates. From the district court's order, we perceive only two grounds for which a rate adjustment might be proper on the basis of special factors. First, some of the participating attorneys have a special expertise in immigration law. This is narrow legal specialty which might entitle them to an adjustment if market rates for their services exceed $75. *Cf. Hoopa Valley Tribe v. Watt,* 569 F.Supp. 943, 947 (N.D.Cal.1983) (increased hourly rates for expert in native



American law). Second, at least one of the plaintiffs' attorneys is fluent in French and Haitian Creole. According to the district court "her language abilities were crucial to her work in communicating with and preparing the testimony of Haitian plaintiffs and witnesses." 646 F.Supp at 1312. If prevailing market rates for her services exceed $75—something which is not readily apparent since her initial fee request was based on a $75 per hour rate—she might be entitled to an increased hourly rate. On remand, the court shall consider whether either of these factors are "special" for EAJA purpose and entitle the relevant attorneys to increased hourly rates.[12]

### 3. "Enhancement"

The district court enhanced the overall fee award of each attorney for the plaintiffs who was awarded fees. The court assumed that the limited circumstances in which the Supreme Court has authorized lodestar adjustments applied to EAJA cases. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council,* 478 U.S. 546, 106 S.Ct. 3088, 92

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[12] The dissent contends that attorneys practicing immigration law do not have any "distinctive knowledge or specialized skill *needful for the litigation in question*" within the meaning of that phrase as it is used in *Pierce,* 108 S.Ct. at 2554 (emphasis added). The majority agrees that not every immigration attorney or every immigration lawsuit warrants an upward adjustment of hourly rates and we would suggest that such is also the case in some patent or foreign law cases. Lawyers and judges could spend the balance of time arguing about the meaning and scope of the above-quoted phrase from *Pierce.* Interpretation of this phrase is better left to the discretion of the district court as application of the phrase will necessarily depend on the complexity of the case ("the litigation in question") and on the experience ("distinctive knowledge") and acquired expertise ("specialized skill") of the particular billing attorney. We are confident that the district court can properly interpret and apply the above-quoted phrase to the facts of this case.

L.Ed.2d 439 (1986) (modification proper only in rare and exceptional cases) (citing *Blum v. Stenson*, 465 U.S. 886, 889, 104 S.Ct. 1541, 1549, 79 L.Ed.2d 891 (1984)). In light of the Court's second *Delaware Valley Citizens' Council* decision, ____ U.S. ____, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987), decided after the district court made its award, the legal status of all enhancements and multipliers in cases concerning fee-shifting statutes is unclear. One thing, however, is certain. Given that the EAJA constitutes a partial waiver of the United States' immunity, the Act must be strictly construed. If the award made by a court is to be based on rates in excess of the figure provided by the Act, it must be because the Act permits it. *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed.2d 250 (1986) (waiver must be construed strictly in favor of sovereign and not enlarged beyond what the language requires). Under the statute, only special factor adjustments and cost of living adjustments are authorized. Blanket enhancements are not authorized. Nonetheless, we will consider whether the factors relied upon in enhancing the overall fee awards can qualify as special factors within the meaning of the EAJA.

#### a. *Pro Bono Publico*

The district court held that because the plaintiffs' attorneys were motivated by concern for the plight of Haitian refugees and not pecuniary self-interest, they were entitled to an increased award. Plaintiffs' counsel are to be lauded for their efforts on behalf of the indigent and those they believed were wrongfully oppressed. But the EAJA does not distinguish between the selfless lawyer and the selfish one. We hold that neither the personal motivations of attorneys acting *pro bono publico*, nor the *pro bono* nature of a case, presents an EAJA "special factor." *Cf.*



*Pierce*, 108 S.Ct. at 2554 (both contingent fee arrangement and undesirability of a case are too broad and general for either to be considered a "special factor").

#### b. *Vindication of Public Rights*

The district court enhanced the fee awards because counsel had acted as "private attorney generals seeking to vindicate public rights." 646 F.Supp. at 1317-18. While we agree that such actions are to be commended, for the reasons just discussed, this consideration cannot support a award exceeding the statutory cap. In many cases where EAJA fees may be awarded, the party opposing the government seeks to force compliance with federal law. In a narrow sense, these cases will always involve a vindication of "public" rather than purely "private" rights.

Permitting adjustments of hourly rates on this ground would therefore contravene the Supreme Court's view that "special factors" must not be "of broad and general application." *See* 108 S.Ct. at 2554.

#### c. *The Emotional Hardship to Plaintiffs' Counsel*

The district court acknowledged, and we do not dispute, that this case imposed unique pressures on counsel for the plaintiffs. Trial evidence established that many of the plaintiffs sustained severe psychological problems as a result of their prolonged detention. Family members were isolated. Some members of the class committed suicide. The court understands the sense of urgency experienced by counsel who seek to secure the release of persons from detention believed unlawful. We also acknowledge that the best of lawyers understand, sympathize with, and act upon the real hardships experienced by their clients. By all accounts, the highly motivated counsel for the plaintiffs upheld the highest standards of the legal profession in this

regard. Yet, we must again conclude, in light of *Pierce*, that meeting the unique emotional burdens in this case constituted one of the many features of this case which might increase our esteem for the lawyers involved but does not constitute a special factor under the EAJA. *Cf. Pierce*, 108 S.Ct. at 2554 (undesirable cases do not, by themselves, give rise to special factors).

#### *d. The Government's Litigious Position*

The district court was clearly disturbed by the United States' general posture in this litigation:

> The government took an unusually unwavering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pretrial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

646 F.Supp. at 1318. We have no quarrel with the district court's observations, that court being uniquely situated to observe the conduct of the lawsuit. *Pierce* gives little guidance as to what can constitute a special factor except for its discussion of certain adjustments specifically discussed as not being "special factors." As with the establishment of a standard to test the question of substantial justification, the Court appears to have recognized that judicial construction of the "special factor" term is likely to evolve with time. Thus, on remand, the district court should be free to approach this question anew, and consider potential special factors that would be consistent with *Pierce* and our discussion here, including whether the government's unusually litigious position in this case might consitute a special factor.[13] The court should remember, however, that nothing "routine" or "generally applicable" to a "broad spectrum of litigation" can count. *See* 108 S.Ct. at 2553.



### *C. Other Components of the Award*

#### 1. Costs

The EAJA authorizes the recovery of three types of litigation expenditures. First, under 28 U.S.C. § 2412(a), a prevailing party opposing the United States in "any civil

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[13] For example, under Rule 11 courts are required to distinguish between contentions that often have no "reasonable basis in law or fact" and those also injected without any purpose but to harass. *See generally* Fed.R.Civ.P. 11 advisory committee's note. Sanctions under Rule 11 are meant to eliminate frivolity *and* harassment, not attorney zealousness. *Id. See also Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir.1986). As the dissent points out, the EAJA already requires that the government's position have no "reasonable basis in law and fact" as a condition precedent to the recovery of fees. The EAJA does not, however, protect a litigant against potential government harassment. It is easy to imagine a situation where a position that is not "substantially justified" is exacerbated by improper purposes in defending the lawsuit. For instance, if the government were aware that the cost of doing business of certain of the plaintiffs' attorneys exceeded the EAJA cap of $75.00 per hour, the government might adopt an aggressive, litigious strategy in order to deter the plaintiffs' attorneys by actually forcing these attorneys to operate at a loss. We do not suggest that this situation occurred, but it is illustrative of how an improper purpose can be a factor that is additional to a "frivolous" position. Thus, if the government in this case advanced litigation for any improper purpose such as harassment, unnecessary delay or increase in the plaintiffs' expense, then consistent with *Pierce*, its action warrants the imposition of a special factor.

action" "may be awarded" costs as delineated in 28 U.S.C. § 1920. The second and third types of expenditures included in the statute are "fees and other expenses," which a district court must award to a party who prevails against the United States in "any civil action (other than cases sounding in tort)" when the government fails to demonstrate that its position was substantially justified. 28 U.S.C. § 2412(d)(1)(A).

The government contests the district court's award of certain litigation expenditures that the district court found to constitute "fees and other expenses." The Act provides a partial definition of these terms:

> "fees and other expenses" include the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project *which is found by the court to be necessary for the preparation of the party's case,* and reasonable attorney's fees . . . ;

28 U.S.C. § 2412(d)(2)(A) (emphasis added).

The government argues that these terms must be given a limited construction since the EAJA represents a waiver of the United States' sovereign immunity. The problem with this interpretation is that "fees" and "expenses" are defined in the Act by example, rather than by limitation. In this regard, we agree with the following observations by Chief Judge Alaimo of the Southern District of Georgia:

> Turning . . . to the structure of the definitions contained in the EAJA, it appears that where the drafters used the word "includes" they intended to provide a *non-exhaustive* list of examples to clarify the meaning of the term. For example, § 2412(d)(2)(G) provides that " 'court' *includes* the United States Claims Court," (yet that section may not be interpreted to mean that *this Court* would not meet the statutory



> definition); likewise, in § 2412(d)(2)(C), " 'United States' *includes* any agency and any oficial of the United States acting in his or her official capacity." Where Congress intended a more exclusive definition, it used the word "means," as in § 2412(d)(2)(B), Where "party" *means* an individual with the appropriate net worth. Several circuits have construed "fees and other expenses" to encompass "costs that are ordinarily billed to a client." *International Woodworkers of America v. Donovan*, 769 F.2d 1388, 1392 (9th Cir.1985) [*opinion amended*, 792 F.2d 762 (9th Cir.1985)]; *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir.1986). The Court agrees with the conclusion of these cases that the list of expenses provided in § 2412(d)(2)(A) was not meant to be all-inclusive.

*City of Brunswick v. United States*, 661 F.Supp. 1431, 1444-45 (S.D.Ga.1987) (emphasis in original), *rev'd on other grounds*, 849 F.2d 501 (11th Cir.1988).

Although some circuits have read this provision more restrictively, they have done so largely without analysis or for reasons with which we disagree. *See Wyandotte Savings Bank v. NLRB*, 682 F.2d 119 (6th Cir.1982); *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211, 223-24 (D.C.Cir.1984); *Weakley v. Bowen*, 803 F.2d 575, 580 (10th Cir.1986). *Wyandotte* suggests that no litigation expenditure (other than attorney's fees) is recoverable under the EAJA unless it is one of the costs enumerated in 28 U.S.C. § 1920. *See* 682 F.2d at 120. This approach reads key language out of the Act. Section 2412(d)(1)(A) provides that "fees" and other "expenses" are awarded "*in addition to* any costs awarded pursuant to subsection (a)," the subsection treating section 1920 costs. *Action on Smoking*, without analysis, holds that the EAJA does not authorize an award for expenses similar to those awarded

in this case. 724 F.2d at 223-24. It relies instead on *NAACP v. Donovan*, 554 F.Supp. 715, 719 (D.C.Cir. 1982). The *NAACP* opinion, however, reads the Act to authorize only those "expenses" listed in subsection 2412(d)(2)(A) or those of a like nature. We will not apply the rule of statutory construction known as *ejusdem generis* in this case for the reasons given by Judge Alaimo in *City of Brunswick*. *Weakley* is unhelpful because it relies totally on *Wyandotte* and the D.C. Circuit's rulings on the matter.

An examination of the nature of the expenses listed in the Act reinforces our reading of it. Items such as engineering reports and studies are extraordinary expenditures not commonly necessary to the preparation of a lawsuit. By including these unusual items in the list of reimbursable expenses, Congress enlarged, rather than contracted, the category of expenditures that are reimbursable under the EAJA. Thus, we reject the government's argument that telephone, reasonable travel, postage, and computerized research expenses are not compensable under the EAJA. *See International Woodworkers of America v. Donovan*, 792 F.2d 762, 767 (9th Cir.1985) (expenses routinely billed to a client—telephone, air courier, attorney travel—are recoverable under the EAJA); *Aston v. Secretary of Health and Human Services*, 808 F.2d 9, 12 (2d Cir.1986) (affirming award of telephone, postage, travel and photocopying expenses).

The limitation on the amount and nature of such expenses is that they must be "necessary to the preparation of the [prevailing] party's case." 28 U.S.C. § 2412(d)(2)(A). "In contrast, expenses of an attorney that are not incurred or expended solely or exclusively in connection with the case before the court, or which expenses the court finds to be unreasonable or unnecessary in the pending litigation, cannot be awarded under the EAJA."



*Oliveira v. United States*, 827 F.2d 735, 744 (Fed.Cir.1987). We hold that the challenged expenses may be reimbursed under the EAJA.

### 2. Paralegal and Law Clerk Time

The district court awarded reimbursement for time spent by paralegals and law clerks where the work was that normally done by an attorney. The hourly rate awarded was $40. This is the rate at which the law firm whose paralegals and clerks were involved bills its clients. The government challenges the rate awarded, and contends that paralegal time is recompensable only at the actual cost to the plaintiffs' counsel. In the context of a Title VII case, we have held that paralegal time is recoverable as "part of a prevailing party's award for attorney's fees and expenses, [but] *only to the extent that the paralegal performs work traditionally done by an attorney.*" *Allen v. United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. Unit B 1982). The same analysis applies here. To hold otherwise would be counterproductive because excluding reimbursement for such work might encourage attorneys to handle entire cases themselves, thereby achieving the same results at a higher overall costs. *See Berman v. Schweiker*, 531 F.Supp. 1149, 1154-55 (N.D.Ill.1982), *aff'd*, 713 F.2d 1290 (7th Cir.1983). We affirm the award of law clerk and paralegal fees.

### 3. Fees for Fees

The last question we consider is whether the district court erred in awarding attorney's fees for the fee litigation without first determining that the government's position in the fees proceedings was without substantial justification. The district court relied on a statement in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1500

(11th Cir.1986), which lends support to this approach. As the government notes in its brief, however, that portion of *Haitian Refugee Center* upon which the district court relied, was later vacated by the *Haitian Refugee Center* panel. 804 F.2d 1573, 1574 (11th Cir.1986).

Those circuits that have discussed the question of "fees for fees" in the EAJA context are divided. Two circuits have indicated that a successful EAJA fee applicant should not recover attorney's fees associated with litigating the fee issues unless the government's position in the attorney's fee litigation is not substantially justified. *See Rawlings v. Heckler*, 725 F.2d 1192, 1196 (9th Cir.1984) (no fees for defending EAJA award on appeal if government's appellate position is reasonable); *Russell v. National Mediation Board*, 775 F.2d 1284, 1285, 1291 n. 8 (5th Cir.1984) (no fees for fee application where agency defense to award was partially meritorious).

The D.C. Circuit has recognized a substantial difficulty with this approach:

> [I]f we require every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit the government to claim that its first EAJA defense was substantially justified on the merits, we face the distinct possibility of an infinite regression of EAJA litigation. A successful EAJA plaintiff will bring another suit claiming fees for bringing the EAJA suit, and the government will defend on the ground that its EAJA defense was substantially justified. If the plaintiff wins this suit, yet a third suit will be required to recover fees for the second suit recovering fees. And if the government contests this suits and loses, yet a fourth suit will have been spawned, and so on. In our opinion the *per se* fee-shifting rule is the least objectionable exit from this Kafka-esque judicial nightmare; in most cases a loss on the generous "substantially justified" EAJA threshold strongly indicates that the government is clinging to an unreasonable position.



*Cinciarelli v. Reagan*, 729 F.2d 801, 810 (D.C. Cir.1984) (footnote omitted). The D.C. Circuit did not squarely hold, however, that successful EAJA fee applicants are automatically entitled to "fees for fees." In a subsequent case, it has held that the government may raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for "fees for fees" on the ground that the technical defense is substantially justified. *American Academy of Pediatrics v. Bowen*, 795 F.2d 211, 214 (D.C.Cir.1986).

The Third Circuit has adopted still a different approach. Where "the sole basis for the opposition [to EAJA fees] is the alleged substantial justification of the government's position in the underlying proceedings," the fee applicant "will almost always, if not always, be entitled to fees for litigation over an EAJA fee petition if she is entitled to fees for the underlying litigation." Yet where the government's opposition to EAJA fees is based on other contentions, "an application for fee petition expenses can present issues not resolved by the proceedings on the original fee petition." *Russell v. Heckler*, 814 F.2d 148, 155 (3d Cir.1987), *vacated on other grounds*, ____ U.S. ____, 108 S.Ct. 2891, 101 L.Ed.2d 925 (1988) (for reconsideration of attorney's fees in light of *Pierce*). As to these issues, the Third Circuit grants the government the opportunity to defend its position as substantially justified. *Id.*

Only the Second Circuit has held that the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim "fees for fees." As Judge Pratt explained for the court,

> To begin with, the very purpose of the EAJA is to ensure that persons aggrieved by unreasonable governmental actions are not prevented from vindicating

their claims by the potentially high costs involved in doing so. Since the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees—which would have been unnecessary if not for the government action—was the one act for which a claimant could not receive compensation. Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been known to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself. The government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent a plaintiff from litigating against the government in the first place. We regard it as more consistent with the congressional purpose to treat plaintiff's fee application as part of the government's cost of taking positions that are not substantially justified.

*Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702, 707 (2d Cir. 1987). We agree with these sound reasons for awarding "fees for fees." It would contravene Congress's purpose in passing the EAJA to require under all circumstances that successful EAJA fee applicants bear the costs of obtaining EAJA fees. This court has already indicated that attorney's fees incurred defending an EAJA award on appeal, or appealing a denial of EAJA fees, are



recoverable as part of the final fee award. *Hudson v. Secretary of Health and Human Services*, 839 F.2d 1453, 1458 n. 7 (11th Cir.1988). *See also Trichilo v. Secretary of Health and Human Services*, 832 F.2d 743 (2d Cir.1987). We agree with the D.C. Circuit that a fixed rule permitting infinite litigation of the substantial justification question would make for unwise judicial policy. We hold, therefore, that the United States may not oppose a "fees for fees" request solely on the ground that its position in the fee litigation was substantially justified.[14]

## IV. CONCLUSION

To summarize, we hold that the district court acted within its discretion in determining that the government's position in the underlying litigation was not substantially justified but that the case must be remanded for recalculation of attorney's fees and expenses in accordance with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED.

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KRAVITCH, Circuit Judge, concurring and dissenting:

I concur in Parts I, II and III A of the majority's opinion. The majority, however, permits an award of fees in excess of the $75 statutory cap for three reasons with which I disagree; I therefore respectfully dissent from Parts III B and IV.

First, I do not agree that the award of cost-of-living adjustments for services rendered prior to 1985 is permissi-

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[14] We express no opinion as to whether a "technical defense" exception to this rule should exist as the government has not briefed the issue.

ble. In 1985, Congress provided that "attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living . . . justifies a higher fee." Assuming Congresss meant what it said, Congress considered $75 per hour reasonable compensation given the cost of living in 1985. With a positive rate of inflation (*see Hirschey v. F.E.R.C.*, 777 F.2d 1, 5 n. 24 (D.C.Cir.1985)), $75 was *a fortiori* reasonable compensation given the cost of living in the years 1980 through 1984.

The Second Circuit in *Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702 (2d Cir.1987), rejected this interpretation "as contrary to the legislative intent, unjustified under tenets of statutory construction, and inevitably bound to lead to incongruous results." *Id.* at 705. The court cited language in the statute providing that the Equal Access to Justice Act " 'shall be effective on or after the date of the enactment of this Act *as if [it] had not been repealed.*' " *Id.* (emphasis in original). In my view, however, these general words do not sanction disregard of particular language setting the cap at $75 per hour. *Cf. Estate of Flanigan v. Commissioner*, 743 F.2d 1526, 1532 (11th Cir.1984).

Exercising insight into the congressional decisionmaking process, the *Trichilo* court opined that Congress "made no decision that $75, measured in 1985 dollars, was still an appropriate cap. . . ." 823 F.2d at 705. The court also noted that it was not "told why the 1985 congress, obviously concerned . . . about inflation . . . , would want to ignore the inflation that had occurred between 1981 and 1985." *Id.* at 706. *See also Allen v. Bowen*, 821 F.2d 963, 967 (3d Cir.1987) (legislative history does not suggest that Congress's "decision not to raise the $75 flat hourly rate was in any way indicative of its desire to reduce the cost of living adjustment"). One answer to the *Trichilo* court's



query is that Congress has no duty to explain itself. Moreover, Congress in 1985 still may have felt that $75 an hour was a reasonable rate for the public funding of lawsuits, notwithstanding any concern for inflation.

Courts relaxing the cap have referred to the sound principle that Congress is presumed to be aware of prior judicial constructions of its statutes. *Trichilo*, 823 F.2d at 706; *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 522 (1st Cir.1987). Invoking this principle does not, however, counter the possibility that by the very act of preserving the $75 cap, Congress evidenced an intent to modify the applicability of prior judicial decisions.

Courts also advance the time-honored "absurd result" argument in support of a holding that cost-of-living adjustments prior to 1985 are permissible. *Trichilo*, 823 F.2d at 706-07; *Sierra Club*, 820 F.2d at 523. I find it plausible that Congress struck a balance between attorney compensation and concerns over an ever-increasing federal budget deficit. *See Pierce*, 108 S.Ct. at 2554 ("Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be"). Such a compromise may have been necessary in order to insure the re-enactment of the Equal Access to Justice Act. If so, the $75 cap represents a reasonable political compromise not open to judicial "interpretation." *Cf. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 865-66, 104 S.Ct. 2778, 2793, 81 L.Ed.2d 694 (1984). But if no such balance was struck, and Congress in fact erred, the problem is for Congress, not the courts, to remedy.

Second, I also disagree with the majority's holding that a lawyer specializing in immigration law may possess a special skill entitling him to increased fees. The depths of fourth-amendment law or first-amendment law, for example, are no less murky than the recesses of immigration

law. With the precedent of the majority opinion, district courts will find it difficult to identify a legal specialty that does not justify an increase.

In its discussion of "special factors," the *Pierce* Court stated:

> We think [the phrase] refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question—as opposed to an extraordinary level of the general lawyerly knowledge and ability useful in all litigation. Examples of the former would be an identifiable practice specialty such as patent law, or knowledge of foreign law or language.

108 S.Ct. at 2554. Patent law and foreign law are narrow areas of specialization that generally require learning not common to lawyers in the United States. By contrast, competence in immigration law requires no peculiar base of knowledge; an attorney with a reasonable amount of "general lawyerly knowledge and ability" can learn immigration law. According a premium for knowledge of immigration law therefore runs counter to the Supreme Court's counsel to "preserve the intended effectiveness of the $75 cap." *Id.*

Finally, I question whether the government's "litigious position" may properly constitute a "special factor." The district court described the government's posture as follows:

> Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiff's contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.



646 F.Supp. at 1318. The majority opinion instructs the district judge to take a fresh look at whether this behavior constitutes a "special factor," advising that nothing "routine" or "generally applicable" to a "broad spectrum of litigation" can count (citing *Pierce*, 108 S.Ct. at 2554), but suggesting that "[i]t is easy to imagine a situation where a position that is not 'substantially justified' is exacerbated by improper purposes in defending the lawsuit." *Ante* note 13.

Certainly, government lawyers should be no less zealous than private lawyers. As outlined by the district court, the attorneys were simply making full use of available process to advance the interests of their clients, the United States. I see no reason why attorney zeal should be a "special factor," for Congress surely anticipated the zeal of its own lawyers when it set the $75 cap. Moreover, as a finding that the government's position had no "reasonable basis both in law and fact" in a condition precedent to every EAJA award, allowing a premium based on the government's "contentions and litigating postures" will likely lead courts to double-count the substantial-justification factor. Rule 11 sanctions are always available to compensate "a litigant whose opposent acts in bad faith in instituting or conducting litigation." Fed.R. Civ.P. 11 advisory committee's note.

As I would hold that premiums in excess of $75 per hour are not available for inflation prior to 1985, for knowledge of immigration law, or for the government's posture in litigation, I respectfully dissent from Parts III B and IV of the court's opinion.

**APPENDIX B**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 81-1260-CIV-SPELLMAN

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN NELSON, ET AL., DEFENDANTS

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**CORRECTED MEMORANDUM OPINION AND ORDER ON ATTORNEY'S FEES, COSTS AND EXPENSES**

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[Filed Oct. 1, 1986]

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**INTRODUCTION**

This matter is before the Court for a determination of the amount of attorney's fees, costs and expenses to be paid by the government to Plaintiffs' counsel[1] under the

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[1] This Court originally entered a Memorandum Order on Attorney's Fees, Costs and Expenses on August 29, 1986. Subsequent to the entry of the Order the Plaintiffs brought to the Court's attention, by a Motion to Amplify the Court's Order, a recent order of the Ninth Circuit Court of Appeals in *LaDuke v. Nelson*, 762 F.2d 1318 (9th Cir. 1985) (Order of August 11, 1986). This Order remanded the case, in part, to the District Court to reconsider its award of a multiplier to Plaintiffs' counsel in light of three recent Supreme Court decisions – *Pennsylvania v. Delaware Valley Citizens' Council for Clean*



Equal Access to Justice Act[2] ("EAJA") and related statutes.[3] The Court has ruled, by separate order, that the Plaintiff's counsel are entitled to such an award.[4] Thus, the only matter which must be resolved is the precise amount to be paid to counsel by the government.

I

**BACKGROUND**

The last two decades have witnessed an influx of refugees into the United States, particularly the South Florida area, that has been perhaps unprecedented in what is considered peacetime.

The government's handling of refugees who arrived from Haiti, the poorest nation in the Western Hemisphere, came under fire in a series of lawsuits filed in the late 1970's and early 1980's. The bulk of these lawsuits were brought by attorneys and human rights activists who sought to protect the civil rights of the Haitian refugees. The litigation that arose from the alleged abuse of those rights was lengthy and bitter.

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*Air*, 106 S.Ct. 3088 (1986); *Library of Congress v. Shaw*, 106 S.Ct. 2957 (1986); *City of Riverside v. Rivera*, 106 S.Ct. 2686 (1986). Upon review of Plaintiffs' motion and memorandum this Court vacated its August 29, 1986 Order to correct any defects in that Order. The Court has now reviewed the three recent Supreme Court decisions and finds that only *Pennsylvania v. Delaware Valley Citizens' Council*, affects the Court's Order of August 29, 1986. In light of that decision and Plaintiffs motion and memorandum the Court has now corrected its decision herein.

[2] 28 U.S.C. § 2412.

[3] 28 U.S.C. § 1920, 28 U.S.C. § 1961.

[4] *Jean v. Nelson*, No. 81-1260 (S.D. Fla. Dec. 6, 1986) (order granting entitlement to attorney's fees). Portions of said Order are reiterated herein; the Order in its entirety is attached hereto as an Appendix.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[5] In essence, the litigation had two primary goals. First, the Plaintiffs sought to stop the mass exclusion hearings which were being held without counsel. And second, Plaintiffs sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force and effect the prior policy of parole pending individual exclusion proceedings.[6]

After a lengthy trial, this Court held that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and that the Plaintiffs' continued

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[5] The background to this litigation is discussed in *Louis v. Nelson*, 544 F. Supp. 973, 978-981 (S.D. Fla. 1982) and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455, 1464-1474 (11th Cir. 1983).

[6] The Complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of counsel or notice of the right to counsel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count III challenged the failure to advise class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public excluison hearings; Count VI challenged the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II; Count IV insofar as its alleged that counsel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982).



incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F. Supp. 973, 993-97 (S.D. Fla. 1982). Ten days later, this Court declared the new detention policy "null and void" as to the defined class, and ordered the release of its members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F. Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the Plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the Defendants stopped the accelerated mass exclusion hearings and class members were released from incarceration.[7] These results were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the Defendant's appeal of this Court's decision on the APA issue, thus leaving the results Plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[8]

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[7] The relief obtained by the Plaintiffs mooted many of the issues raised in the Complaint. Plaintiffs were released from detention and indirectly obtained counsel or notice of the right to counsel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, Plaintiffs have had access to class members (Count IV). Also as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. *See* 8 C.F.R. § 212.5 (1985).

[8] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the Plaintiff class in the enforcement of the new detention policy and that the Plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable

The results of this litigation were clearly overwhelming and important. To be sure, the Plaintiffs waited anxiously for the vindication of their rights; the attorneys, who brought this suit *pro bono publico,* have waited to be compensated for their efforts. Moreover, the government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs.

The Court has reviewed in detail hundreds of pages of affidavits in which counsel outlined their hours, costs and expenses, and their customary fees. Counsel calculated their fees under several theories, taking into account any reduction which the Court indicated it would make to reflect its finding that the position of the government concerning the equal protection issue was reasonable. In addition to having the affidavits before it for review, the Court has had the benefit of five days of hearings including expert testimony, and has carefully assessed the credibility of the witnesses presented.

Thus, the Court has significant documentation and testimony on which to base its findings. Furthermore, having presided over this litigation from soon after its inception, the Court is uniquely able to evaluate the skill, diligence, contribution and effectiveness of counsel.

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aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) (*en banc*). The Supreme Court held that the *en banc* court should not have reached the constitutional issue because under the statutes and regulations now in effect, parole decisions must be made without regard to race or national origin. *Jean v. Nelson,* 105 S.Ct. at 2998.



II

**FIGURES INVOLVED**

The following charts reflect the preliminary amounts of costs, expenses and fees requested by counsel. These figures do not take into consideration any reduction or enhancement for any purposes, but serve simply to acquaint the reader with the sums involved in a case of this magnitude.

Costs and Expenses

| Attorney | § 1920 Costs | EAJA Expenses | Total |
|---|---|---|---|
| HRC, Inc. | $47,204.82 | $39,081.25 | $86,286.07 |
| Fried, Frank | 39,951.34 | 56,374.26 | 95,325.60 |
| Bruce Winick | -0- | 1,372.90 | 1,372.90 |
| Wald, Harkrader | -0- | 499.82 | 499.82 |

Attorneys Fees

| Attorney | Total Hours | Hourly Rate | Total |
|---|---|---|---|
| I. Kurzban | 2,172.5 | $125.00 | $271,562.50 |
| I. Stotzky | 1,194.85 | 125.00 | 149,356.75 |
| B. Winick | 1,476.75 | 125.00 | 184,593.75 |
| V. Weisz | 628.2 | 75.00 | 47,115.00 |
| C. K. Hall | 97.8 | 100.00 | 9,780.00 |
| Wald, Harkrader | 62.75 | 75.00-85.00 | 4,973.00 |
| M. Rosen | 620.00 | 125.00 | 77,500.00 |
| Fried, Frank (atty.) | 3,821.00 | 50.00-175.00 | 419,071.00 |
| Fried, Frank (para.) | 1,188.00 | 40.00 | 47,524.00 |

## III

## THE STANDARD

The Equal Access to Justice Act provides for the award of reasonable expenses and attorney's fees in the litigation. 28 U.S.C. § 2412(d)(2)(A). Pursuant to the EAJA "attorney's fees shall not be awarded in excess of $75.00 per hour unless the court determines that an increase in the cost of living or special factors, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *Id.*[9]

Under the governing Eleventh Circuit precedent, the factors identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974) should be applied by the Court in determining a reasonable fee within the scope of the Equal Access to Justice Act. *Florida Suncoast Villas, Inc. v. United States*, 776 F.2d 974, 975 (11th Cir. 1985). Of course, the *Johnson* factors are not exhaustive. *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3088 (1986); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

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[9] § 2412(d)(2)(A) states:

"fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);



The Court must thus apply these various factors in ascertaining the reasonableness of the attorney fee request. In ascertaining the appropriate hourly rate, the EAJA limits the amount to $75.00 per hour unless the Court makes additional findings to justify an increased hourly rate based upon an increase in the cost of living or "special factors." In addition to these statutory criteria justifying a greater than $75.00 per hour rate, the Court may further enhance the total attorney's fee. The Court may enhance the fee upon a finding by the Court of the existence of factors *other than* those appropriate in ascertaining a reasonable fee as well as an appropriate hourly rate under the Equal Access to Justice Act. *Pennsylvania v. Delaware Valley Citizens' Council, supra; Blum, supra; Hensley, supra.*

In the instant case, the Court has already found that the Plaintiffs were the prevailing party for purposes of awarding them attorneys' fees and other expenses under the EAJA. The Court further found that the government's position on the Administrative Procedure Act ("APA") issue was not substantially justified, but that any award would be adjusted downward to reflect the fact that the government's position was not unreasonable as to the equal protection claim. The Court observed, however, that "there was considerable overlap between the APA and the equal protection claim." (Appendix, p. 12).

Additionally, the Court noted that "[b]ecause the litigation before the Supreme Court concerned only the equal protection claim the Plaintiffs are not entitled to compensation under the EAJA for their efforts in that Court." (Appendix, p. 14 n.8). The possibility of partially compensating the Plaintiffs for those efforts was not entirely ruled out, since the government's change in position concerning their argument on whether nationality could be a factor in determining whether an alien could be paroled may have unnecessarily prolonged the litigation.

Thus, the Court must first ascertain what a reasonable number of hours are for each counsel; what an appropriate hourly rate under the EAJA should be for each counsel; and whether an enhancement or diminution of the fee thus calculated is appropriate.

## IV

## THE JOHNSON FACTORS

The Court will begin its analysis by examining the facts of this case under the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 458 F.2d 714 (5th Cir. 1974).[10] Such an analysis will provide the basis for determining the reasonable number of hours expended by each counsel and whether the hourly rate should be $75.00 or less. *Florida Suncoast*, 775 F.2d at 976.

### A. *The time and labor required.*

This lawsuit was commenced more than five years ago. The class action suit involved numerous plaintiffs. The

[10] The twelve factors are:

(1) the time and labor required;
(2) the novelty and difficulty of the questions;
(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience reputation and ability of the attorneys';
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.



record in this case includes seventeen volumes of pleadings, a forty-five volume trial transcript, and a docket, containing over six hundred entries. These reflect the enormous amount of time and labor devoted to this case.

The time spent by counsel on this lawsuit is listed earlier in this Order. The Court points out that the attorneys have already reduced their hours to reflect the hours spent on the equal protection claim and the time spent at the Supreme Court level. Thus, the hours spent by counsel for which they seek compensation are considerably lower than those listed previously in this Order.[11] The revised schedule of hours, as prepared by counsel, reads as follows:

| Attorney | Total Hours | (E.P. Hours) | (60% S.Ct.) | Reimbursable Hours |
|---|---|---|---|---|
| I. Kurzban | 2,172.5 | ( 66.4) | ( 268.17) | 1,837.93 |
| I. Stotzky | 1,194.85 | ( 15.0) | ( 276.00) | 903.85 |
| B. Winick | 1,476.75 | ( 23.0) | ( 153.48) | 1,300.27) |
| V. Weisz | 628.2 | ( 0 ) | ( 0 ) | 628.2 |
| C. Hall | 97.8 | ( 0 ) | ( 0 ) | 97.8 |
| M. Rosen | 620.0 | ( 0 ) | ( 46.2 ) | 573.8 |
| Wald, Harkrader | 62.75 | ( 0 ) | ( 0 ) | 62.75 |
| Fried, Frank (Atty) | 3,821.0 | (363.0) | ( 674.4 ) | 2,783.6 |
| (Para) | 1,188.1 | ( 0 ) | ( 186.06) | 1,002.04 |
| TOTAL | 11,261.95 | (467.4) | (1,604.31) | 9,190.24 |

Several factors added to the volume of hours spent in litigating this case. First, local counsel had to confer with out-of-state counsel on virtually every step taken. The

[11] This table reflects the figures proposed by Plaintiffs' counsel. As will become apparent, the figures will be revised by the Court.

local attorneys, Ira Kurzban, Irwin Stotzky, Bruce Winick, Vera Weisz, Michael Rosen, and for a certain period of time Christopher Keith Hall, had to maintain constant contact with co-counsel in New York, Robert Jucean and his law firm Fried, Frank, Harris, Shriver & Jacobson, and at the initial phases, the Washington law firm of Wald, Harkrader & Ross. Naturally, having counsel located in more than one place adds to the number of hours required to prosecute a case, but there is certainly no prohibition against having local and out-of-state counsel work on one lawsuit; it is quite common.

Second, the Plaintiffs faced a formidable foe. The government had, at one time or another, thirty different attorneys working on the case. Naturally, the Plaintiffs had to respond in kind with their own forces, although the Court notes that Plaintiffs had approximately one half the number of counsel.

Third, as the Court mentioned in its December 6, 1985 Order, the government's change in position regarding the plaintiffs' claim that the government did in fact have a detention policy that was instituted *ultra vires* of the APA, served simply to prolong the litigation unnecessarily.

Fourth, although the Court noted at one point that the APA claim might be appropriate for summary judgment, it did not so find. Indeed, when Plaintiffs requested summary judgment before trial, the government opposed them.

Finally, the government also forced Plaintiffs to litigate constitutional claims that would not have needed to be litigated if the government had conceded at the trial level that the INS was precluded by statute and regulations from making nationality-based decisions—a position they did not adopt until argument before the Supreme Court.

In short, having first hand knowledge of the demands of this case, the intensity and length of the pleadings, briefing



and argument and the time schedules involved, the Court is in the perhaps unenviable position of knowing that the time spent by Plaintiffs' counsel in the prosecution of this case has been reasonable and well supported by the record.

The government took issue with the record keeping of Plaintiffs' counsel. The Court finds this contentiousness to be without merit. For five years the attorneys kept accurate time sheets, setting forth the time spent and the nature of work involved. Counsel were extensively cross-examined by the government, and all responded to the satisfaction of the Court that by and large, time sheets reflected contemporaneous record keeping. The Court has in its possession exhibits which include the time sheets for counsel and finds any inadequacies in record keeping to be inconsequential.

**B.** ***The novelty and difficulty of the questions.***

There can be little serious dispute but that this has been a novel and complex case. Mere volume does not necessarily indicate complexity, but in the instant case, the size of the record and the passage of time do signify what has been the product of extreme complexity and difficulty. The appellate court does not differ with this view. *Jean v. Nelson*, 711 F.2d 1455, 1462 (11th Cir. 1983).

**C.** ***The skill requisite to perform the legal services properly and the experience, reputation and ability of the attorneys.***

The Court finds that these factors must be considered together, rather than separately as they are listed in *Johnson*. These factors are intertwined, and must be discussed in context. Each attorney or firm will be addressed individually so that their particular role in this case will be give fair credit.

***Ira J. Kurzban***

Ira J. Kurzban's abilities and dedication as an immigration lawyer and champion of the public interest are nationally renowned. He has been identified by the *National Law Journal* as one of this country's twenty leading immigration law experts and has been described as "an extremely capable lawyer of widely recognized legal skill and dedication to the poor and disadvantaged," *Haitian Refugee Center, Inc. v. Smith,* Case No. 79-206-CIV-JLK, slip op. at 13 (S.D. Fla. May 24, 1984).

As counsel for the National Council of Churches of Christ in the United States and the National Emergency Civil Liberties Foundation, he has litigated and been counsel of record in every class action lawsuit brought on behalf of Haitian refugees in the Southern District of Florida.

He has received local and national recognition and numerous awards for this work. For example, Mr. Kurzban was the first recipient of the Tobias Simon Pro Bono Service Award. This award is given by the Florida Supreme Court; Mr. Kurzban received the award on April 18, 1982. Also in 1982, Mr. Kurzban was recognized by *American Lawyer Magazine* as being one of the most prominent *pro bono* attorneys in the nation. *Esquire* magazine included Mr. Kurzban in a story on new stars to watch. In a special edition of *Newsweek* magazine entitled "Sweet Land of Liberty," Mr. Kurzban was hailed as one of the "New American Heroes." Perhaps one of the achievements of which Mr. Kurzban should be most proud, centers around his creation of and involvement with a student and alumni run *pro bono* program at the University of California at Berkeley Law School.

In addition to his litigation experience with respect to immigration law and international law, he is a nationally



recognized expert in many of the areas of law involved in this case, including political asylum, refugee status, and immigration litigation, and has lectured and published extensively in these areas in respected journals and before sophisticated audiences.

He has taught immigration law, immigration litigation, civil rights, and civil liberties litigation, and has appeared before Congressional Committees on matters concerning immigration legislation.

In sum, when the words "immigration attorney" are uttered, there is little doubt but that the name Ira Kurzban springs to mind.

***Fried, Frank***

Fried, Frank is a fine law firm with a strong commitment to public interest litigation and has a very high reputation. Despite local counsel's pleas, Fried, Frank, Harris, Shriver & Jacobson was virtually the only firm in the country possessing the requisite resources and experience in both immigration and federal litigation that was willing to participate in this lawsuit without immediate compensation.

Fried, Frank's reputation was attested to by the government itself at the hearing on the issue of attorneys fees: "We would state that with regard to Mr. Juceam's firm, that we have the highest regard for that firm in the Department of Justice . . . ."

Fried, Frank regularly participates extensively in *pro bono publico* practice, for causes liberal and conservative, in support of and in opposition to governmental positions and policy, including immigration and refugee matters.

At any given time, Fried, Frank had numerous attorneys working on the instant case. This is not unusual at a large firm. Rather than list the attorneys and their

achievements, since only their names were put into evidence, the Court will only take notice that the law firm as a whole enjoys a sterling reputation.

Robert E. Juceam, the partner at Fried, Frank who organized and supervised its participation in this case, is an attorney of outstanding ability and reputation, as is reflected in the testimony of his colleagues. The Court points out that Mr. Juceam is not seeking any compensation for himself at all despite the fact that he spent untold hundred of hours working on this case. Mr. Juceam's selflessness and generosity merit special mention by the Court and set an example for all of us.

Mr. Juceam is held in awesome esteem among immigration practitioners even though immigration law is not his exclusive field of practice.

Mr. Juceam's practice has included, on a regular basis, substantial general federal court and agency litigation, in addition to the representation of aliens in the United States and abroad, and of companies seeking to engage aliens for employment in the United States.

A past president of the American Immigration Lawyers Association, Mr. Juceam has also served as the organization's vice president, secretary, liasion committee member to the United States Department of State and of the Immigration and Naturalization Service and on its Board of Governors. He has lectured extensively on immigration law and refugee policy, and has testified before Congressional committees and subcommittees concerning proposed immigration legislation.

***Bruce J. Winick***

Bruce J. Winick is a tenured full professor at the University of Miami School of Law. He has taught Administrative Law, Federal Civil Procedure, and Federal



Jurisdiction. He is an outstanding scholar and a dedicated teacher.

Professor Winick has been employed as an associate at a large law firm in New York City, by the City of New York in a number of administrative and legal capacities, and has served the American Civil Liberties Union of Florida as its General Counsel.

Professor Winick has extensive litigation experience in state and federal courts, including federal lawsuits involving judicial review of administrative action and also has extensive experience as a consultant to law firms and public litigant groups on the constitutional aspects of administrative law and special procedural issues involved in litigation against the government.

As a result of this experience, Professor Winick is a national expert in the areas of judicial review of agency action, the procedural complexities of litigation against the government, the constitutional subjects of due process and equal protection, and immigration law.

Professor Winick is also an expert in the use of statistics in judicial proceedings and his work in this area was crucial to development of Plaintiffs' discrimination claim.

***Irwin P. Stotzky***

Irwin P. Stotzky is a tenured full professor at the University of Miami Law School and his reputation is a very high one in this community. Professor Stotzky was instrumental in assisting the great late Soia Mentschikoff, former Dean of the University of Miami School of Law, in elevating the status of the law school to one of the nation's leading institutions.

Professor Stotzky has taught, among other courses, constitutional law, criminal law and constitutional criminal procedure, legal skills and jurisprudence, and im-

migration law. He has published, lectured and consulted extensively in these areas, and in particular in the area of constitutional aspects of immigration litigation.

Professor Stotzky has been involved in litigation in federal and state courts that raised constitutional questions that played an important part in this lawsuit. He consulted or worked directly on several other Haitian cases, playing an important role in litigation of the constitutional claims in these cases.

As a result of this experience, he is recognized as a national expert on the First Amendment, the constitutional subjects of due process and equal protection, international law and immigration law. His expertise was invaluable to the presentation of Plaintiffs' constitutional claims.

***Michael J. Rosen***

Michael J. Rosen is an outstanding young attorney who enjoys an excellent reputation in the Southern District of Florida.

Mr. Rosen's practice consists almost exclusively of federal criminal litigation. Prior to joining Rosen & Rosen, a Miami firm, he gained hundreds of hours of trial experience as an attorney with the Federal Public Defender's office in the Southern District of Florida.

Mr. Rosen is a member of the Federal Bar Association and was chairperson of the committee for redrafting the Standing Discovery Order entered in all federal criminal cases in the Southern District of Florida.

As the only attorney ready to assist full-time in preparation and conduct of the lengthy trial of Plaintiffs' claims, Mr. Rosen's expertise in federal trial practice was invaluable.



***Vera Weisz***

Vera Weisz has extensive experience in representation of Haitian refugees. During the course of her employment at Florida Rural Legal Services, Inc. in Belle Glade, Florida, and then at the Haitian Refugee Center, Inc., in Miami, Florida, she has been involved in the representation of over one thousand Haitian refugees seeking asylum in the United States, has represented over five hundred clients at exclusion procedings, deportation, and asylum hearings, and has participated in three major federal lawsuits related to the rights of Haitian refugees. Ms. Weisz has lectured, conducted training seminars, and published on asylum law.

Ms. Weisz was one of the few attorneys in Miami who could speak fluently French and Creole, the language used by most of the class members. Her experience in processing claims of Haitian refugees and her language abilities were crucial to her work in communicating with and preparing the testimony of Haitian plaintiffs and witnesses.

***Christopher K. Hall***

Christopher K. Hall has extensive experience in the areas of international and immigration law. He has contributed his time to the Lawyers Committee for International Human Rights in connection with refugees and asylum applications and has taught international law, international human rights and international organizations at the University of Miami Law School.

He also has extensive litigation experience. He frequently argues in the Second Circuit and the New York State Court of Appeals and intermediate appellate courts and has worked on three Supreme Court cases.

Mr. Hall also worked as an associate at Kurzban, Kurzban & Weinger, P.A. and at the New York Attorney General's office.

*Wald, Harkrader*

Two attorneys from the Washington, D.C. law firm of Wald, Harkrader participated in the initial stages of the lawsuit and seek compensation for their services. These two attorneys, Mary Coombs and Mark Stern, also enjoy fine reputations in the legal community.

D. *The quality of the work.*

In determining the appropriate fee, the Court must also consider the quality of counsels' performance. *Pennsylvania v. Delaware Valley Citizens' Council, supra.* In the instant case, the Court finds that not only is there record evidence that counsel performed at an unusually high level of skill for attorneys charging the rates they did, but the Court also points out that additional credit must be given for having taken the case in the first place and *maintaining* the levels of dedication and quality for five years.

It is true that the quality of the work can be reflected in the number of the hours documented. But, to apply this principle in a vacuum or to hold that the quality of the work is reflected solely by the number of billable hours would, in effect, hold the law and its practitioners to standards and rules that are more fitting for economists. It would be unfair to equate the degree of skill held by counsel with the swiftness with which she or he could perform the work. To do so only encourages shodiness and haste, neither having a place in the legal world. The Court finds that based on its first hand knowledge of the quality



of Plaintiffs' counsels' work, and as evidenced by the record, that it represented unsurpassable quality.[12]

E. *The preclusion of other employment by the attorney due to the acceptance of the case.*

Ira Kurzban testified that this case caused him to turn down more lucrative work which would have benefited his law firm's coffers. The demands of this case also caused a serious crimp in the scholarly work generally undertaken by members of academia, such as Professors Stotzky and Winick.

F. *Awards in similar cases.*

The Eleventh Circuit recently affirmed the lower court's award of attorneys' fees in a related case of up to $125.00 per hour. *Haitian Refugee Center, Inc. v. Meese*, 791 F.2d 1489 (11th Cir. 1986). The Court notes that other decisions under the EAJA have awarded substantial fees, including awards based upon an hourly rate well in excess of $75.00 per hour, *see e.g., International Woodworkers of America, AFL/CIO Local 3-98 v. Donovan*, 769 F.2d 1388 (9th Cir. 1985); *LaDuke v. Nelson*, 762 F.2d 1318, 1332-33 (9th Cir. 1985).

G. *The customary fee.*

There is nothing in the record to contradict the figures given by counsel at the hearing and throughout the documentation that state their customary fees. Those attorneys in academia adequately testified as to what their fees are when working on outside projects.

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[12] For another Court's view concurring in the quality of the work performed by counsel, see *Haitian Refugee Center, Inc. v. Smith*, No. 79-2086 (S.D. Fla. May 24, 1984) (Order granting motion for fees, costs and expenses).

**H.** ***Whether the fee is fixed or contingent.***

The fees in this case were contingent. Had the Plaintiffs failed to attain the level of success they had, the attorneys involved would have had to sustain a loss of several million dollars—not an easy thing for even the most lucrative practitioners.

**I.** ***Time limitations imposed by the client or the circumstances.***

The time pressures of this case were constant. They were imposed, in large part, by the Court, and by the appellate courts, but were also due in part to the exigencies of the situation. The demands of this Court were overwhelming. In sum, the pace was rather hectic throughout the case.

**J.** ***The "undesirability" of the case.***

There was uncontroverted evidence at the hearing that lead counsel received several letters which contained the senders' distate with Mr. Kurzban's decision to participate in this case. Mr. Kurzban also lost some clients solely on account of his humanitarian stand in this case. The Court knows from first hand experience that this was not a popular case in some of the public's eye. The facts involved in this case brought out sincere and intense reactions from the community; some people were sympathetic with the Plaintiffs' plight, others were not shy about their lack of sympathy. Counsel, the Court and the Plaintiffs were exposed to the darker side of humanity on more than one occasion.

**K.** ***The nature and length of the professional relationship with the client.***

This factor is not relevant to the analysis in this case.



**L.** ***The Amount involved and the results obtained.***

This factor is crucial in this case, and provides the basis for a fully compensatory award. For, as the Supreme Court states in *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983): "[t]he result is what matters."

Plaintiffs clearly accomplished the primary goals of the lawsuit, which were to stop the mass exclusion hearings being held without counsel, to enforce the rule of law through the Administrative Procedure Act, to establish that race and national origin were impermissible factors in the enforcement of facially neutral statutes, and to obtain the class members' release from detention.

Finally, Plaintiffs' counsel took the government to task here, and succeeded at prohibiting the government from pursuing a course of action contrary to our laws and the forces of human dignity. This litigation reinforced the concept that parole decisions must be made without regard to race or national origin. *Jean v. Nelson,* ____ U.S. ____, 105 S.Ct. 2992, 2998 (1985).

## V

## ADDITIONAL FACTORS

**A. Duplication**

One of the most significant areas of concern expressed by the government involved its contention that counsel's efforts were duplicative and thus not compensable. The Court must disagree. It is not uncommon, nor should it be, that attorneys work in groups. In situations such as these, the court should:

> assess the possibility that reported hours include duplication by reviewing with particular care the number of lawyers present at hearings, depositions and other discovery proceedings, and by evaluating

> the roles played by the lawyers in the litigation generally. The Court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required. Because utilizing more than one lawyer may be reasonable in some situations, such as during settlement conferences or during trial, *we decline to require an automatic reduction of reported hours to adjust for multiple representation or potential duplication. Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (emphasis added).

Counsel has represented to the Court, and the Court can find no reason to cast aspersions on the representation that counsel went through their time sheets countless times and purged them of any unnecessary duplication. Furthermore, it must be noted that lack of duplication is not the goal of efficient attorneys, avoidance of *unreasonable* duplication is the goal. Thus, an award will be reduced "only if the attorneys are *unreasonable* doing the *same* work." *Johnson v. University College of University of Alabama*, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in the original).

In the instant case, multiple attorneys for the plaintiffs *and* the government participated at every stage of the litigation. This was not a one of two lawyer case. Each attorney had his or her own specialty or strength. After receiving a pleading, counsel had to review the document, confer with out-of-state counsel, plan their strategy, divide the work depending upon the nature of the task, conduct research, gather resources, and then meet as a group. Naturally, there was room for duplication. That fact, however, does not call for the conclusion that any duplication was unreasonable or that it taints the entire efforts.

The Court finds that the work of counsel was not unreasonably duplicative, and that "[a]ll attorneys who



contribute their services to a case may be awarded reasonable attorneys' fees." *Dowdell v. City of Apopka*, 698 F.2d 1181, 1188 (11th Cir. 1983) (citation omitted).

**B.** ***Unsuccessful claims: Equal Protection and Supreme Court Arguments***

As the Court stated in its December 6, 1985 Order, it found it necessary to reduce Plaintiffs' counsel's hours to reflect the fact that the government was substantially justified in the stance it took in response to the equal protection claim. Additionally, since mainly the equal protection claim was argued at the Supreme Court level, this Court suggested that it might be inappropriate to grant an award to counsel for its efforts at that level. However, throughout the proceedings at the district and appellate court levels, the government argued that nationality could be a factor in determining whether an alien is paroled. But in the Supreme Court, the government changed its position. It argued that the INS' rules and regulations prohibited the INS from making parole decisions based on nationality, but that under the Constitution, the INS was not prohibited from making such decisions. This Court finds that if the government had argued at the District Court and Eleventh Circuit levels the position it took in the Supreme Court, the constitutional claims would not have needed to be litigated. The government's change in position, therefore, indicates that to some degree it lacked substantial justification. *Haitian Refugee Center, Inc. v. Meese*, 791 F.2d 1489, 1497 (11th Cir. 1986) (Looking to the consistency of the government's position in determining substantial justification). Thus, some award is in order for counsel's efforts in the Supreme Court.

As for the equal protection claim, counsel has delineated those hours which can be solely attributable to that issue and has excised them from their total hours.

Counsel has also excised 60% of the time spent at the Supreme Court level. The Court finds both excisions are low, and thus rules that such time must be further reduced.

The Supreme Court observed in *Hensley*: "[t]here is no precise rule or formula for making this determination. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley,* 461 U.S. at 436-37. The Court finds that both options suggested by the Supreme Court are applicable to the case at bar.

Specific hours spent on the equal protection issue have been identified and eliminated from the total. As previously mentioned, the Court finds that counsel's estimate of time spent on the equal protection claims is too low. By the Court's estimate, forty percent (40%) of counsel's time was spent on clearly non-equal protection matters. Perhaps sixty percent (60%) of counsel's time was spent on interrelated matters; an insignificant portion of that time was spent exclusively on equal protection issues. Of the 60% of the time spent on commingled material, the Court estimates that approximately 25% of that time was spent on equal protection issues. Thus, a reduction of 15% from the total number of hours is in order.

Those hours spent at the Supreme Court level shall be reduced by 75% rather than 60%. The Court will allow compensation for a fractional number of hours, because in light of the government's change in position and in light of the other issues briefed in the Supreme Court some award of fees is appropriate. The legal position of the government may have been substantially justified in some sense; the tactical position of the government, however, cannot claim the same status, and the Plaintiffs' counsel should not be penalized for the government's change in position concerning whether it could discriminate under existing statutes and regulations. *See, Haitian Refugee Center, Inc. v. Meese, supra* at 1497.



In sum, the Court finds that its reduction of the hours spent on the equal protection claims is more appropriate than counsel's estimates. Additionally, the Court has, *sua sponte,* reduced counsel's total hours to reflect a 75% reduction in those hours spent at the Supreme Court level.

### C. *Documentation*

The last factor to consider is whether counsel adequately documented their time and hours so as to merit a fully compensatory award.

The government argues that attorneys are required to keep contemporaneous, almost perfect, records and time sheets or else suffer the consequences. Such a draconian approach is unnecessary and not supported by the case law. Rather, counsel must conscientiously keep records and time sheets which "should identify the general subject matter of his [her] time expenditures." *Hensley,* 461 U.S. at 424. There is no prohibition against restructuring time sheets where contemporaneous records are not kept. *Ramos v. Lamm,* 713 F.2d 546, 553 n.2 (10th Cir. 1983).

Even where there are discrepancies in time records, no reduction in the award is mandatory. Where an attorney's affidavit is not specific as to the nature of the work performed, but does provide the court with the general area of the subject matter, the court need not demand greater accuracy. *See Preston v. Heckler,* 596 F. Supp. 1158, 1161 (D. Alaska 1984).

In reviewing the affidavits, and having heard testimony on the matter, the Court finds it unnecessary to reduce, based on the government's allegation that counsel kept inadequate records, the total award or the number of hours for which counsel seeks compensation.

## VI

## HOURLY RATE

Under the EAJA, the district court may adjust the hourly rate upward from $75.00 if special factors are present. The Act states in pertinent part: "attorneys fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).[13]

The Court finds that there are special factors warranting an upward adjustment of the fee.

### A. *Increase in the cost of living*

Unlike many cases, the work done has been spread fairly evenly over the past five years, perhaps with the exception of 1986. Because of the inherently sporadic nature of the judicial system, work had to be done in spurts (to

[13] Recent amendments to the EAJA make the Act permanent and contain clarifying provisions that in virtually every respect broaden and strengthen the Act's application. Beside expanding eligibility and making express the Act's application to a wide range of proceedings, the amendments specifically adopt a broad meaning of "position of the United States" to include agency action as well as the government's litigating position and in other respects reaffirms that the statutory language is to be interpreted broadly in favor of private parties. H.R. Rep. NO. 19-120, 99th Cong., 1st Sess. at 8-9, 19 (1985).

Throughout the legislative history, the purposes of the Act—"to expand the liability of the United for attorneys' fees and other expenses" and "to increase accessibility to justice" are emphasized. The Committee decries the fact that awards during the initial three-year period of the Act were "dramatically less" than predicted. *Id.* at 4, 8-9. These amendments and their legislative history make it clear that the Act is to be applied more forcefully to encourage private parties to pursue litigation against the government.



prepare for oral argument, briefing schedules, etc.). "By specifying inflation as a 'special factor', Congress indicated its concern that lawyers receiving fees at different times obtain equivalent value." *Action on Smoking and Health,* 724 F.2d 211, 219. Thus, there is clear instruction from the language of the Act that counsel should have its award reflect an increase in the cost of living which results from a long delay in payment. *Copeland v. Marshall,* 641 F.2d 880, 893 (D.C. Cir. 1980) (*en banc*) (citation omitted).

### B. *Limited availability of counsel*

There was substantial testimony that the Plaintiffs' counsel encountered a shameful amount of disinterest from the local legal community when counsel sought to gather forces for this lawsuit.[14]

As mentioned earlier, this was a complex case. Counsel had to have knowledge of many interwoven and discrete areas of the law. Additionally, any attorney who did become involved in this case had to do so at her or his own expense, since the possibility of being reimbursed for he work was remote. Finally, the Court heard undisputed testimony that despite counsel's best efforts, they were unable to attract local counsel that had the combination of knowledge, financial capability, and dedication to take on the responsibilities that this case entailed.

Based on the foregoing factors, this Court finds that an hourly fee award above $75.00 per hour is appropriate for

[14] As the Eleventh Circuit observed, "[e]fforts had been made by the INS to secure representation for the Haitians, especially *pro bono,* in the Miami area. The response it received is an ugly reflection of the commitment with which the bar meets its responsibility to make legal services available to the disadvantaged." *Haitian Refugee Center, Inc. v. Smith,* 676 F.2d 1023, 1031 n.16 (5th Cir. 1982).

Plaintiffs' counsel. The Court finds that the following schedule reflects the number of hours reasonable expended and the appropriate hourly rate for each attorney or law firm:

| Attorney | Hours | EP/S.CT | Total | Rate | Lodestar |
|---|---|---|---|---|---|
| Kurzban | 2,172.5 | 335.21 (S.Ct)<br>325.88 (E.P.) | 1511.41 | $125.00 | $188,926.25 |
| Stotzky | 1,194.85 | 345.0 (S.Ct)<br>179.23 (E.P.) | 670.62 | $125.00 | $ 83,827.50 |
| Winick | 1,476.75 | 191.85 (S.Ct)<br>221.51 (S.Ct) | 1063.39 | $125.00 | $132,923.75 |
| Weisz | 628.2 | -0- | 628.2 | $ 75.00 | $ 47,115.00 |
| Hall | 97.80 | -0- | 97.80 | $100.00 | $ 9,780.00 |
| Rosen | 620.00 | 57.75 (S.Ct) | 562.25 | $100.00[15] | $ 56,225.00 |
| Wald, Harkrader | 62.75 | -0- | 62.75 | $75-85.00 | $ 4,973.00 |
| Fried (atty) | 3,821.00 | 843.0 (S.Ct)<br>573.1 (E.P.) | 204.9 | $50-175.0 | $270,551.25 |
| (para) | 1,188.10 | 232.58 (S.Ct) | 955.52 | $ 40.00 | $ 38,220.80 |

## VII

## ENHANCEMENT OF THE FEE AWARD

The Supreme Court has repeatedly recognized that in certain circumstances an enhancement of the fee award is appropriate. *Pennsylvania v. Delaware Valley Citizens' Council,* 106 S.Ct. 3088, 3898 (1986); *Blum v. Stenson,* 465 U.S. 886, 899 (1984); *Hensley v. Eckerhard,* 461 U.S. 424, 435 (1983). The Court is aware that such a conclusion is proper only in certain rare and exceptional cases and must be supported by specific evidence on the record in detailed findings. *Pennsylvania v. Delaware Valley Citizens' Council, supra,* at 3098.

[15] Although Mr. Rosen requested $125.00 an hour, this Court is of the opinion that, when Mr. Rosen's role in this case is compared to that of lead counsel, an hourly rate of $100.00 is appropriate.



The Court believes that this case presents the rare and exceptional circumstances warranting an enhancement of the fee award. This conclusion is based on the Court's finding that the following factors, none of which were previously considered by the Court in its assessment of the fee award under the Equal Access to Justice Act, exist.

### A. *Pro Bono Publico*

A special factor meriting enhancement of the fee award that does not arise in most Equal Access to Justice Act cases is the Pro Bono Publico nature of this case and of the Plaintiffs' attorneys' motivation in brining it. This was not a case merely to vindicate the pecuniary interests of the Plaintiffs; rather, it was to free them from unlawful detention and to vindicate their rights to fair process and equal treatment. Plaintiffs' counsel acted in an exemplary fashion and are to be commended for their outstanding efforts in the public interest. Moreover, their exemplary conduct has had a salutory effect on the Bar.

The *pro bono publico* bar in this community and throughout the nation has been shaken to its roots; a more conscientious attitude toward the plight of the indigent and unpopular has been taken in recent years due to this case, and the nation-wide efforts to obtain *pro bono* counsel in the context of the case. Indeed, as a direct result of this litigation and counsels' effort, the largest *pro bono* program in the history of the United States was established. Helton, *The Most Ambitious Pro Bono Ever Attempted,* 12 Hum.Rts. 19 (1984). Surely this "result" is one which cannot be measured in monetary terms, but must be measured nonetheless.

### B. *The Vindication of Public Rights*

Plaintiffs' counsel functioned in this litigation as private attorney generals seeking to vindicate public rights. In-

deed, they frequently characterized their aims in the lawsuit as vindicating the rule of law in the context of immigration practice. As previously indicated, this was not a case, like perhaps most are under the Equal Access to Justice Act, to vindicate the purely precuniary interests or other private rights of their clients. Rather, it sought to put an end to illegal immigration practices and to establish a consistent policy for all aliens facing detention by the Immigration Service. As a direct result of counsels' actions, the public interest has been vindicated through the government's publication of its new detention policies. Actions of this kind seeking to vindicate such important public interests are especially to be commended, justifying enhancement of the fee award.

C. *The Emotional Hardship to Plaintiffs' Counsel*

The members of Plaintiffs' class spent many months in unlawful detention, suffering great hardship and deprivation. Many sustained psychological problems. Several committed suicide, including one of the named class representatives. The human stakes were high. Moreover, this was a nationwide class action involving members of Plaintiffs class dispersed to detention facilities throughout the country. These factors placed special pressures on counsel that were exceptional. The Court is not unaware of the tremendous emotional and psychological pressure that this situation placed upon Plaintiffs' counsel in virtually all of their activities in this lawsuit. This special circumstance also merits enhancement of the fee award.

D. *The Government's Litigious Position*

The government took an unusually unwaivering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Order, forced repeated applications for emergency relief, put Plaintiffs in a posture requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as law, each and every important issue asserted by Plaintiffs. The government even opposed Plaintiffs' efforts to seek summary judgment on the A.P.A. issue and thereby unnecessarily prolonged the litigation. The Court notes that even the EAJA recognizes the independent importance of placing sanctions against overly litigious conduct. 28 U.S.C. § 2412(d)(1)(C). Although the government's conduct was surely motivated by good faith, their overly litigious posture unnecessarily prolonged this litigation.



As a result of the four factors the Court concludes that an enhancement of the attorneys' fee award in the amount of an additional 15% is warranted. *Each* of these factors taken *alone* would, in the Court's view, warrant such a 15% enhancement.

Even if a question is raised as to the permissibility of an enhancement under the E.A.J.A., the above factors should be viewed, alternatively, as additional "special factors" justifying an increase in the hourly rates requested and already awarded above, 28 U.S.C. § 2412(d)(2)(A).

## VIII

## CONCLUSION ON ATTORNEY'S FEES

In conclusion, the Court finds that a fifteen percent (15%) enhancement of the award is proper after consideration of all special factors.

In light of the analysis above concerning the award and the 15% enhancement thereof, the Court finds that the following chart represents the correct numbers and tabulations which constitute a fair and just attorneys' fees award in this case:

| Attorney | Award | 15% Enhancement | Total Fee Award |
|---|---|---|---|
| Kurzban | $188,926.25 | $28,338.94 | $217,265.19 |
| Stotzky | 83,827.50 | 12,574.13 | 96,401.63 |
| Winick | 132,923.75 | 19,938.56 | 152,862.31 |
| Weisz | 47,115.00 | 7,067.25 | 54,182.25 |
| Hall | 9,780.00 | 1,467.00 | 11,247.00 |
| Rosen | 56,225.00 | 8,433.75 | 64,658.75 |
| Wald | 4,973.00 | -0-[16] | 4,973.00 |
| Fried, (atty) | 270,551.25 | 40,582.69 | 311,133.94 |
| Frank (para) | 38,220.80 | not applicable | 38,220.80 |
| | | | $950,944.87 |

## IX

## COSTS

The Plaintiffs' counsel requests reimbursement for costs and expenses in the following amounts:

| Attorney | § 1920 | EAJA | Sup.Ct. | Total less Sup.Ct. |
|---|---|---|---|---|
| HRC, Inc. | $47,204.82 | $39,081.25 | $ 9,059.31 | $ 77,226.76 |
| Fried | $39,951.34 | $56,374.26 | $13,964.34 | $ 82,361.26 |
| Winick | -0- | $ 1,372.90 | $ 1,206.01 | $ 166.89 |
| Wald | -0- | $ 499.82 | -0- | $ 499.82 |
| | | | | $160,254.73 |

There is clearly a lack of consistency among the courts when it comes to determining which items are recoverable

[16] Because the attorneys from Wald, Harkrader were involved only in the preliminary stages of this litigation, the enhancement factors are not applicable to their efforts.



as costs or expenses under 28 U.S.C. § 1920 or under 28 U.S.C. § 2412(d)(2)(A) respectively.

Section 1920 of Title 28 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursement for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The above list is not exhaustive, however, of which items courts recognize as recoverable in cases brought under the EAJA.

That is so because the EAJA states in pertinent part in Section 2412(d)(1)(A):

For the purpose of this subsection–

> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

Thus, the language of the EAJA illustrates that while the "costs" incurred by the party may be recoverable only

under § 1920, "expenses" may be recoverable under § 2412(d)(2)(A). The clear language of the latter section lists certain expenses as examples, not limitations. *Hoopa Valley Tribe,* 569 F. Supp. at 947.

Courts have interpreted the above statutory sections inconsistently. For example, in *Action on Smoking and Health v. C.A.B.,* 724 F.2d 211, 224 (D.C. Cir. 1984), the court did not allow compensation as expenses under the EAJA for taxi fares, filing, wrapping postage, but did allow compensation for photocopying costs, citing to *NAACP v. Donovan,* 554 F. Supp. 715, 719 (D. D.C. 1982).

Another court allowed prevailing plaintiffs to recover their copying costs, but arbitrarily reduced the requested amount of 25¢ per page to 10¢. *Wolfe v. Wolfe,* 570 F. Supp. 826, 826 (D.S.C. 1983).

In the case of *American Academy of Pediatrics v. Heckler,* 580 F. Supp. 436, 440 (D.D.C. 1984), the court went a step further. There, the court disallowed compensation under the EAJA for research costs an overhead, as well as transportation and filing. Furthermore, the court held that paralegal and law clerk time was only compensable at the actual cost of their salaries paid out by the law firm. This court strongly disagrees with that position.

In a decision handed down the same day as *American Academy of Pediatrics,* the same court held that "to award 'fees' for law clerk and paralegal time at hourly charges billed to clients would, in effect, be to compensate those firms for both overhead and profit." *Ashton v. Pierce,* 580 F. Supp. 440, 443 (D.D.C. 1984). Yet, the court did permit reimbursement for the salaries paid to the paralegals and law clerks. Insight into the court's somewhat jaundiced view of the EAJA is provided by the following passage:

> It is now accepted that lawyers who prevail in these cases may be entitled to be paid a reasonable fee for



> services which are still somewhat euphemistically referred to as "*pro bono*". Attorneys hope to receive and usually request out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the "learning experiences" of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice.

580 F. Supp. at 444.

This Court finds the above harangue to be simply inapplicable to the instant case. If the court in *Ashton* had been privy to the workings of this case, it would have been crystal clear that any abuses inherent in our legal system are seldom found in the fee applications of dedicated lawyers who provided a vital service to our citizenry by offering, *without compensation,* to protect the rights of all persons. Congress perceived a need to offer the possibility of compensation to attorneys who are willing to take the government to task; but *only* when the government acts without substantial justification are the public coffers opened.

With regard to the compensability of paralegal and law clerk time, the Court finds that the analysis set forth in *Hoopa Valley v. Watt,* 569 F. Supp. 943, 947 (N.D. Cal. 1983) to be more pursuasive. There, the court noted:

> [T]he lower rates sought for law clerk services are reasonable and should be compensated as part of attorney's fees because the use of such services is a cost-efficient component of the modern practice of law.

Although law clerk and paralegal services constitute a part of attorney's fees, there is no basis for applying any multiplier to the figures. Thus, the Court will compensate Plaintiffs' counsel for the work performed by their paralegals and law clerks pursuant to the rate schedule provided by counsel.

The Court agrees with the Plaintiffs' position that virtually all expenses and costs reasonably incurred are recoverable under either 28 U.S.C. § 1920 or the EAJA. This position is consistent with the ameriolative purposes of the EAJA and the appropriately broad view of costs taken by the Eleventh Circuit in the civil rights context. *Dowdell v. City of Apopka, Florida,* 698 F.2d 1181, 1192 (11th Cir. 1983). ["with the exception of routine office overhead normally absorbed by the practicing attorney, all reasonable expenses incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988."] The court allowed reimbursement in *Dowdell* for travel, telephone and postage, and cited with approval several cases which permitted recovery for additional costs and expenses, such as mileage, photocopying, food and lodging.

This Circuit is not alone in its position that costs and expenses are not limited to docket fees and the like. Rather, the Ninth Circuit recently permitted an award for costs of telephone calls, postage, air courier and attorney travel expenses on the ground that similar costs are routinely awarded under other fee statutes, and thus should be awarded under the EAJA. *International Woodworkers of America, AFL-CIO, Local 3098 v. Donovan,* 769 F.2d 1388 (9th Cir. 1985). *See also Hoopa Valley Tribe v. Watt,* 569 F. Supp. 943 (N.D. Cal. 1983) (telephone and travel costs awardable as part of expenses since they would normally be billed to client).

As for the witness and expert witness fees, the Court is satisfied that the testimony provided by Messrs. Gitlow, Bernsen and Gordon at trial was necessary, as was the testimony of Messrs. Mailman and Rogow at the hearing on attorney's fees.

With regard to the claims for computer time, the Court finds that Lexis charges are dissimilar from typing in that



Lexis fees are paid to entities outside the law firm and also generally charged to the client. Computer charges should be allowable as expenses and this Court will so allow compensation for those expenses.

Finally, the Court opines that the record keeping practices of the claimants has been sufficiently accurate so that no deduction therefore is necessary. The Court also notes at this time that the HRC, Inc., being an organization that has neither the facilities nor financial strength to employ a state of the art billing system, did a good job of record keeping in light of those limitations.

**SOME DEDUCTIONS ARE NECESSARY**

The Court can find no way to justify awarding compensation for secretarial overtime as either costs or expenses. Secretarial work is part of the everyday activity of a law firm which constitutes its overhead. Secretarial salaries are paid to employees of the firm, and thus are not similar to those monies paid to persons outside the firm such as process servers or witnesses. Furthermore, their salaries cannot be equated with costs, such as filing fees, or expenses such as postage or computer charges, which are similarly paid to entities outside of the law firm. Attorneys cannot be compensated for normal overhead expenses.

The Court finds no authority to support the inclusion of hours and subsequent charges related to secretarial overtime in the award. The chart outlining the costs and expenses awardable is thus amended to reflect the deduction as follows:

| Attorney | § 1920 | EAJA | Overtime | S.Ct. | Total |
|---|---|---|---|---|---|
| HRC | $47,204.82 | $39,081.25 | $ 633.40 | $ 9,059.31 | $ 76,563.36 |
| Fried | $39,951.34 | $56,374.26 | $14,752.60 | $13,964.34 | $ 74,939.26[17] |

[17] This figure adds in the expert witness fee and costs and copying which add up to $7,330.60, said amount not being included in the

| Attorney | § 1920 | EAJA | Overtime | S.Ct. | Total |
|---|---|---|---|---|---|
| Winick | -0- | $ 1,372.90 | -0- | $ 1,206.01 | $ 166.89 |
| Wald | -0- | $ 499.82 | -0- | -0- | $ 499.82 |
| | | | | | $152,169.33 |

**XI**

**CONCLUSION ON COSTS AND EXPENSES**

In conclusion, the Court finds that the summary of costs and expenses framed above accurately reflects what the law of this Circuit requires. In order to give true vitality to the EAJA and its corrolating statutes, courts must not be parsimonious solely because the monies paid are removed from the public coffers. On the contrary, the law requires courts not to consider that prevailing plaintiffs are paid from public funds. *Copeland v. Marshall,* 641 F.2d 880, 894-96 (D.C. Cir. 1980).

**XII**

**FEES FOR FEES**

Under a recent case, the Eleventh Circuit held:

> [I]n this case of first impression for the Eleventh Circuit, we apply the general intent of the Act and decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified. *Haitian Refugee Center, Inc. v. Meese,* 791 F.2d 1489, 1500 (11th Cir. 1986).

Following the decision in *Haitian Refugee Center, Inc. v. Meese, supra,* Plaintiffs' counsel submitted affidavits to support their request for attorneys' fees, costs and ex-

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Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and which the Court includes at this time.



penses for litigating the fee issue to date. The amounts that Plaintiffs' counsel have requested are as follows:

| Attorneys | Fees | Costs | Expenses |
|---|---|---|---|
| Ira J. Kurzban | $13,125.00 | $ 2,407.31 | $301.36 |
| Bruce J. Winick | $ 1,687.50 | | |
| Irwin P. Stotzky | $ 2,562.50 | | |
| Vera Weisz | $ 2,500.00 | $ 358.62 | |
| Fried, Frank (atty) | $33,993.75 | | |
| (para) | $24,110.00 | $20,526.91 | (Cost and expenses) |

None of the fees, costs or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which it incorporates herein, the Court believes these requests are reasonable.

**XIII**

**POST JUDGMENT INTEREST**

As for post-judgment interest, the EAJA was amended August 5, 1985 to included the following paragraph:

> (f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be determined under Section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate or affirmance.

This statutory amendment overrules this circuit's previous ruling in *Arvin v. United States,* 742 F.2d 1301 (11th Cir. 1984) which held that the district court was without authority to award interest on EAJA attorney's fees awards. The amendment is selfexplanatory and requires no further comment by the Court.

## XIV

## CONCLUSION

It is within the Court's discretion to ascertain what constitutes a reasonable award of attorney's fees, costs and expenses under the Equal Access to Justice Act. The Court must make sure that the Act's fees provisions are not used to create "windfalls" to counsel. But, at the same time, counsel must be fairly compensated for their efforts. The findings and conclusions above illustrate what this Court believes is a fair award

Based on the above and foregoing, it is hereby

ORDERED AND ADJUDGED that attorneys fees, costs and expenses are awarded to counsel as follows:

IRA KURZBAN is awarded $217,265.19 in attorney's fees;

IRWIN STOTZKY is awarded $96,401.63 in attorney's fees;

BRUCE WINICK is awarded $152,862.31 in attorney's fees and $166.89 in costs;

VERA WEISZ is awarded $54,$182.25 in attorney's fees;

CHRISTOPHER KEITH HALL is awarded $11,247.00 in attorney's fees;

MICHAEL ROSEN is awarded $65,658.75 in attorney's fees;

WALD HARKRADER is awarded $4,973.00 in attorneys' fees and $499.82 in costs and expenses;



FRIED, FRANK is awarded $311,133.94 in attorneys' fees, $38,220.80 in paralegal and law clerk fees and $75,939.26 in costs and expenses; and

HAITIAN REFUGEE CENTER, INC. is awarded $76,563.36 in costs and expenses.

It is further ORDERED AND ADJUDGED, that attorneys' fees, costs and expenses for the fee litigation are awarded to counsel as follows:

IRA KURZBAN is awarded $13,145.00 in attorney's fees, $2,407.31 in costs and $301.36 in expenses;

BRUCE J. WINICK is awarded $1,687.50 in attorney's fees;

IRWIN P. STOTZKY is awarded $2,562.50 in attorney's fees;

VERA WEISZ is awarded $2,500.00 in attorney's fees and $358.62 in costs and expenses;

FRIED, FRANK, HARRIS and SHRIVER is awarded $58,103.75 in attorney's fees and paralegal fees and $20,536.91 in costs and expenses.

DONE AND ORDERED in Chambers, at Miami, Florida this 1 day of Oct. 1986.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

cc: Ira Kurzban, Esquire
Irwin Stotsky, Esquire
Bruce Winick, Esquire
Michael Rosen, Esquire
Vera Weisz, Esquire
Niels Frenzen, Esquire
Robert Juceam, Esquire
Wald, Harkrader
Michael Lindemann, Esquire
Leon Kellner, U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 81-1260-Civ-SPELLMAN

LUCIEN LOUIS, ET AL., PLAINTIFFS

*vs.*

ALAN NELSON, ET AL., DEFENDANTS

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**ORDER CONCERNING PLAINTIFFS' ENTITLEMENT TO ATTORNEYS' FEES, COSTS AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

THIS CAUSE came before the Court on the plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses under the Equal Access to Justice Act. For the reasons detailed below, this Court finds that the plaintiffs are entitled to an award of attorneys' fees, costs, and expenses allocable to their efforts in litigating their claims before this Court and the United States Court of Appeals for the Eleventh Circuit. By separate Order, this Court shall schedule a hearing to determine the amount that shall be awarded.

The Equal Access to Justice Act ("EAJA") provides that:

> a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).

Thus, in order to grant an award of attorneys' fees, this Court must find that the plaintiffs were the prevailing parties within the meaning of the Act, that the government's



position was not substantially justified and that there are no other special circumstances that would make an award unjust. All of the requirements for an award of attorneys' fees have been met here.

**THE PLAINTIFFS WERE THE 'PREVAILING PARTIES'**

The Supreme Court has observed that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in the litigation achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhardt*, ____ U.S. ____, 103 S.Ct. 1933, 1939 (1983), (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)). There can be no doubt in this case that the plaintiffs succeeded on a significant issue.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[1] In essence, the litigation had two primary goals. First, the plaintiffs sought to stop the mass exclusion hearings which were being held without counsel.[2] And second, plaintiffs sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force and

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[1] The background to this litigation is discussed in this Court's opinion, *Louis v. Nelson*, 544 F.Supp. 973, 978-981 (S.D. Fla. 1982), and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455, 1464-1474 (11th Cir. 1983).

[2] Indeed, shortly after this case was filed the government conceded that the exclusion orders entered at such hearings were invalid and therefore said orders were vacated. Thus, plaintiffs were the prevailing party on this aspect of the litigation and, in light of the government's action, its position was not substantially justified.

effect the prior policy of parole pending individual exclusion proceedings.[3]

After a lengthy trial, this Court held that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and the plaintiffs' continued incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F.Supp. 973, 993-97 (S.D.Fla. 1982). Ten days later, this Court declared the new detention policy "null and void", and ordered the release of class members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F.Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the defendants stopped the accelerated mass exclusion hearings and class members were released from in-

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[3] The complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of counsel or notice of the right to counsel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count III challenged the failure to advise class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public exclusion hearings; Count VI challenged the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V, and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II, Count IV insofar as it alleged that Haitians in detention had first amendment rights of access to counsel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F. Supp. 881 (S.D. Fla. 1982).



definite incarceration.[4] These results were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the defendant's appeal of this Court's decision on the APA issue, thus leaving the results plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[5]

The fact that plaintiffs did not "prevail" on their claim that the new policy violated their fifth amendment rights to equal protection does not mean that they cannot be considered "prevailing parties" for attorneys' fees purposes. Plaintiffs need not prevail on every issue to be considered

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[4] The relief obtained by the plaintiffs mooted many of the issues raised in the complaint. Plaintiffs were released from detention and indirectly obtained counsel or notice of the right to counsel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, plaintiffs have had access to counsel and counsel have had access to class members (Count IV). Also as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. *See* 8 CFR § 212.5 (1985).

[5] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the plaintiff class in the enforcement of the new detention policy and that plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc). The Supreme Court held that the *en banc* court should not have reached the constitutional issue because under the statutes and regulations now in effect, parole decisions must be made without regard to race or national origin. *Jean v. Nelson*, 105 S.Ct. at 2998.

a prevailing party. For purposes of attorneys' fees, "[t]he result is what matters.' *Hensley*, 103 S.Ct. at 1940. Plaintiffs merely pursued alternative litigation theories in attacking the INS' new detention policy.[6]

**THE GOVERNMENT'S POSITION ON THE APA ISSUE WAS NOT SUBSTANTIALLY JUSTIFIED**

The government has the burden of proving that its position "had a reasonable basis both in law and fact." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6, U.S. Code Cong. & Admin. News 1098, p. 4989; S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979). The Eleventh Circuit has emphasized that the legislative history of the Equal Access to Justice Act requires "the government to make a *strong showing* to demonstrate that its action was reasonable." *S. & H. Riggers & Erectors, Inc. v. O.S.H.R.C.*, 672 F.2d 426, 430 (11th Cir. 1982) (citation omitted) (emphasis supplied by the court). *See also Environmental Defense Fund, Inv. v. Watt*, 722 F.2d 1081, 1085 (2d Cir. 1983). The government has not and, indeed, cannot make the requisite showing here.

On August 5, 1985, the Equal Access to Justice Act was amended with regard to the "position of the United States" when determining substantial justification. Under the amendment, which applies to pending cases, the government must not only show substantial justification with regard to its litigating position, but also "the action or failure to act by the agency upon which the civil action is based." Pub.L.No. 99-80, ¶ 2(c)(2)(d). Under the facts of

[6] This Court was well aware that after it found that the new policy was violative of the APA that "[t]echnically . . . [it] need not go further in order to resolve plaintiffs' other claims for relief." *Louis*, F.Supp. at 997. However, the Court chose to review the equal protection claim in the interests of "judicial economy and fairness." *Id.* at 997-98.



this case, the distinction makes little difference. *See Ashburn v. United States*, 740 F.2d 848 n.1 (11th Cir. 1984) (noting that in a typical case there is no real difference between action of agency and litigation position). The INS make a determination that its new detention policy did not have to comply with the rulemaking requirements of the Administrative Procedure Act. When this was challenged in Court, attorneys from the United States Attorney's Office and the Department of Justice argued that the INS was correct. The position taken by the INS and the position taken by the government attorneys in defending the INS's actions were essentially the same. And these positions were unreasonable.

The INS was well aware prior to this litigation that the courts in this jurisdiction had consistently rejected INS' claim that the APA did not apply to changes of substantive policy regarding Haitian refugees. *National Council of Churches v. Egan*, No. 79-2959-Civ-HOEVELER, Slip op. at 3 (S.D. Fla. Aug. 3, 1979) (preliminary injunction entered, not appealed); *Sannon v. United States*, 460 F.Supp. 458, 466-67 (S.D. Fla. 1978), *remanded to be vacated as moot*, 631 F.2d 104 (S.D. Fla. 1978).

Indeed as early as March 10, 1981, the INS Acting General Counsel wrote a memorandum summarizing the legal requirements applicable to the defendants' detention policy and mass exclusion hearings. Citing the *Sannon* case as authority, he advised the INS that "[a]ny change in regulations which takes rights or privileges away from aliens will most likely require a 60-day notice and comment period, and a 30-day delayed effective date. . ." Legal Memorandum by INS Acting General Counsel Paul Schmidt, Px94. But even though the INS was apparently aware that it needed to comply with the APA, the defendants intentionally refused to do so. As this Court found:

> They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to

> the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

*Louis v. Nelson*, 544 F.Supp. at 981.

In light of prior precedent and the advice of counsel, INS' refusal to comply with the APA was not reasonable; nor was the position of the United States Attorney's Office in defending these actions by claiming that the change in policy was not a rule subject to the rulemaking requirements of the APA. This Court rejected the government's claims in its opinion, finding that the change in policy was "clearly" a rule subject to the rulemaking requirements of the APA. *Louis v. Nelson*, 544 F.Supp. at 997. The Eleventh Circuit found that defendants were not likely to succeed on this issue and denied their request for a stay. *Jean v. Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982). After hearing the case, the Eleventh Circuit panel completely rejected the government's arguments that the new policy was not a rule to which the APA rulemaking requirements applied and affirmed the decision of this Court. *Jean v. Nelson*, 711 F.2d at 1483.

The government's factual position in this litigation was also without merit. The defendants repeatedly denied that there was a new detention policy for Haitians, claiming that the district directors still had complete discretionary authority to parole individuals or, alternatively, that the directors were merely enforcing the statute. *See also Jean v. Nelson*, 711 F.2d at 1469-1470 (discussing conflicting testimony at trial by Administration officials as to whether there was a policy change). It was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had



instituted this policy without complying with rulemaking procedures. Since the plaintiffs had consistently maintained that there was a detention policy, the defendants' unreasonable factual position unnecessarily prolonged the litigation of this matter.

Finally, the defendants have not demonstrated any special circumstances which would make an award unjust. Indeed, considering the extraordinary efforts of plaintiffs' counsel and the excellent results they achieved, it would be unjust to deny an award of attorneys' fees.

**THE PROPER STANDARD**

The issue of attorneys' fees in this case is complicated, however, by the fact that the government's legal position—that the INS's action did not violate the equal protection guarantee of the fifth amendment—must be considered reasonable in light of the fact that the Eleventh Circuit, sitting *en banc,* actually agreed with the government on this point. Even though the Supreme Court found that the circuit court should not have reached the constitutional issue, the government was certainly "justified" for EAJA purposes in defending against the claim that the INS' actions violated the equal protection guarantee.

In *Hensley,* the Supreme Court emphasized that counsel should not be penalized for pursuing, in good faith, alternative claims for relief.[7] Although the Court observed in a

[7] According to the Court:

> In [certain] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will en-

footnote that the standard it set forth is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " 104. S.Ct. at 1939 n.7, this Court is of the opinion that these principles must be modified to some degree for fee awards under the Equal Access to Justice Act. Unlike the Civil Rights Attorney's Fees Awards Act, which allows prevailing parties in suits brought under specified civil rights statutes to recover "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988, the Equal Access to Justice Act mandates the award of attorneys' fees *unless* "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Thus, under the Equal Access to Justice Act, a prevailing party in a suit against the government cannot be awarded fees when the government's position was reasonable.

In *Matthews v. United States,* 713 F.2d 677 (11th Cir. 1983), the Eleventh Circuit articulated the standard to be used in an Equal Access to Justice Act claim when a plaintiff prevails in some but not all its claims against the United States. Adopting the approach of the Third Circuit in *Goldhaber v. Foley,* 698 F.2d 193, 197 (3d Cir. 1983), the Court noted that neither the terms of the Act nor its legislative history addressed this situation. It therefore

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> compass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters.

*Hensley v. Eckerhart,* 103 S.Ct. at 1940 (citation and footnote omitted).



began its analysis by looking to the underlying purpose of the Equal Access to Justice Act. If found:

> The governing principle of the Act is that the "United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation." The central purpose of the Act is "to eliminate any barrier to litigation challenging unreasonable government conduct presented by the specter of attorney's fees. . . . Because the Equal Access to Justice Act contemplates deterring only unreasonable positions," it would contravene the purposes of the Act to require the government to bear the expense of defending even its reasonable positions. Following the Third Circuit, we adopt the position "that the United States is only responsible for that portion of the expenses attributable to its unjustified positions."

713 F.2d at 683-684 (citations omitted).

Thus, when reviewing a claim for attorneys' fees under the EAJA, the Court must take into account not only the results obtained but also the reasonableness of the government's positions on each of the disputed claims. As discussed above, the Court finds that the government was not substantially justified in its position on the APA claim. By prevailing on this claim, the plaintiffs obtained virtually all the relief they requested, a factor that should weigh heavily in the determination of the fee award. On the other hand, because the government did not act unreasonably in defending against the claim that the INS' actions violated the equal protection guarantee of the fifth amendment, any fee award must also be reduced accordingly.

The Supreme Court observed in *Hensley* that when a lawsuit involves a "common core of facts" or "related legal theories" as this case did, "[m]uch of counsel's time will be

devoted generally to the litigation as a whole, making it difficult to divide hours expended on a claim by claim basis." 103 S.Ct. at 1940. This observation is particularly apt here. Determining the amount of time spent on each claim would be particularly onerous in this case, given the interrelated nature of the facts and theories and the number of attorneys involved in the various aspects of the litigation. The Court notes that there was considerable overlap between the APA and the equal protection claim. The preliminary issues were essentially the same. For example, for both claims plaintiffs had to establish that they had standing, that this Court had subject matter jurisdiction, that they were entitled to proceed as a class, that a "final" INS order was not required, that they had exhausted administrative remedies, that the detention policy was not committed to agency discretion and that the political question doctrine did not apply.

Even at trial, the presentation of the equal protection issue overlapped to some degree with the APA claim. Defendants argued that there had not been a change in detention policy and that INS officials continued to have the same discretion to grant parole. Plaintiffs' Exhibit 1, for example, was offered to prove both that the defendants had a policy and that this policy discriminated against Haitians.

This Court does not think it is appropriate to further protract the matter by attempting to identify which specific hours and expenses should be eliminated from a fee award because they are attributable to the equal protection claim and not the APA claim. Rather, one of the factors the Court will consider in determining the ultimate fee award in this case is that the government was not unreasonable in defending against the equal protection claim. Any award will be adjusted downward accordingly. The Court is of the opinion that the percentage of total



attorney time that should be attributed to each claim can be approximated.

The Court will conduct a hearing to determine the total number of hours that can be considered "reasonably expended" on the litigation and a reasonable hourly rate for the attorneys involved. In addition to the downward adjustment discussed above, the Court will consider whether the fees should be enhanced for any reason pursuant to 28 U.S.C. 2412(d)(2), including the excellent results achieved by plaintiffs' counsel, the limited availability of qualified counsel for this kind of litigation, and the delay in payment of this award.[8]

DONE AND ORDERED in Chambers, at Miami, Florida, this 6th day of December, 1985.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to all counsel of record.

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[8] Because the litigation before the Supreme Court concerned only the equal protection claim, the plaintiffs are not entitled to compensation under the EAJA for their efforts in that Court. However, the plaintiffs have pointed out that the government apparently changed its litigation position as the case progressed. Before the Supreme Court, the government argued that the INS was precluded by statute and regulations from making nationality-based distinctions. Based upon this representation, the Court found that it was unnecessary to reach the constitutional issues. At trial, however, the government argued to the contrary—that nationality can be a factor in determining whether an alien is paroled.

This Court recognizes that if the government had taken the position it now takes during the trial, the constitutional claims may not have needed to be litigated. The Court will therefore consider the government's apparent change in position in adjusting the final fee award.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 86-5887
D.C. Docket No. 81-1260

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

*versus*

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

---

Appeals from the United States District Court
for the Southern District of Florida

---

[Filed Feb. 2, 1989]

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Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

**JUDGMENT**

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

KRAVITCH, Circuit Judge, concurred in part and dissented in part and filed an opinion.



ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part and VACATED; and that this cause be and the same is hereby REMANDED to said District Court for recalculation of attorney's fees and expenses in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: December 27, 1988
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

**APPENDIX D**

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 86-5887

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

*versus*

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

---

Appeal from the United States District Court
for the Southern District of Florida

---

[Filed May 17, 1989]

---

**ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC**

(Opinion December 27, 1988, 11 Cir., 198__, __ F.2d __).
(May 17, 1989)

Before KRAVITCH and CLARK, Circuit Judges, and ESCHBACH*, Senior Circuit Judge.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.



PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00537

Supreme Court, U.S.
FILED
NOV 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-601

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

*Petitioners,*

—v.—

MARIE LUCIE JEAN, ET AL.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

*Counsel*:
BRUCE J. WINICK, ESQ.
IRWIN P. STOTZKY, ESQ.

ROBERT E. JUCEAM, ESQ.
TERRENCE A. CORRIGAN, ESQ.
SANDRA M. LIPSMAN, ESQ.

*Counsel of Record*:
IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN & WEINGER, P.A.
Plaza 2559
2650 Southwest 27th Avenue
Miami, Florida 33133
(305) 444-0060

*Attorneys for Respondents*

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IN THE

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COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

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---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### STATEMENT

Respondents will not burden the Court with their own detailed statement of the procedural posture of this case. Respondents merely wish to emphasize certain facts that are not apparent from the government's Statement.

1. The government omits from its Statement the fact that the litigation over fees in this case has now lasted seven years—longer than the litigation on the merits, which itself was

described by the Eleventh Circuit as "long, complex and bitterly contested. . . ." (Pet. App. at 1a).*

2. The government incorrectly argues here that it "prevailed on all the issues that were fully litigated in this case." (Pet. at 11 n.10). The district court unequivocally found that:

> Plaintiffs clearly accomplished the primary goals of the lawsuit, which were to stop the mass exclusion hearings being held without counsel, to enforce the rule of law through the Administrative Procedure Act, to establish that race and national origin were impermissible factors in the enforcement of facially neutral statutes, and to obtain the class members' release from detention.

(Pet. App. at 67a, *see also id.* at 89a-92a). The Eleventh Circuit agreed that plaintiffs prevailed, as well as with the district court's detailed conclusion that plaintiffs effectively received the relief sought in each count of the complaint. (Pet. App. at 48a-49a, 90a-91a, 8a-11a, 23a).

3. Similarly, despite the unanimous view of the courts below to the contrary (Pet. App. at 13a-17a, 53a, 56a, 92a-95a), the government continues to argue that its position was "substantially justified." As the Eleventh Circuit found, the government's position was unreasonable both legally and factually. Among other things, the government ignored the advice of its own counsel that its actions were unlawful and denied crucial facts until "well into the litigation [when] the defendants admitted what had been obvious. . . ." (Pet. App. at 15a-17a.)

4. The Petition altogether omits the critical fact that the government has waived the issue it would now have this Court

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* The entire litigation reflects the government's propensity to protract the case unreasonably. As the district court observed:

> The government took an unusually unwaivering and litigious position throughout the litigation. Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn.

(Pet. App. at 76a-77a).



decide. The government did not challenge on any basis an award of "fees for fees" in the district court. Indeed the district court used the government's waiver of this issue as the explicit basis for the award. (Pet. App. at 85a).

## REASONS FOR DENYING THE PETITION

It is inappropriate and unnecessary for this Court to review the issue of "fees for fees" in light of the procedural posture of this case and the status of the issue in the lower courts and in Congress.

1. The question raised by the government—the standard for granting "fees for fees" under the EAJA—is not clearly presented in the record, and indeed was waived below. As the district court found:

> None of the fees, costs, or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which it incorporates herein, the Court believes these requests are reasonable.

(Pet. App. at 85a). The waiver basis for the district court's decision on the "fees for fees" issue should thus preclude certiorari for a number of reasons.

a. If this Court granted certiorari to consider the question of the standard under which "fees for fees" should be awarded, the Court could well decide the case on the altogether separate ground of waiver and thus not reach the point on which certiorari was granted. In such circumstances, certiorari should be denied. *See The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation"); *see also* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 201 (6th ed. 1986) *citing Sanson*

*Hosiery Mills v. NLRB*, 344 U.S. 863 (1952), and *The Arlington, Inc. v. Mayer*, 339 U.S. 965 (1950).

b. If this Court granted certiorari and decided the question of the standard for an award of "fees for fees," on remand it would be open to the district court to adhere to its decision on the "fees for fees" granted based solely on waiver. Since resolution of the issue could therefore be irrelevant to the outcome of the case, a grant of the writ would be inappropriate. *See* R. Stern, E. Gressman & S. Shapiro, *supra* at 201-02 *citing Sommerville v. United States*, 376 U.S. 909 (1964). Moreover, the existence of an alternate procedural ground for decision fully independent of the substantive question framed by the Petition would render a decision on the substantive question an advisory opinion beyond this Court's Article III powers.

c. The fact that this case is already on remand to the district court provides an additional and compelling argument for denying certiorari at this time. The remand will afford an opportunity for clarification of the question of whether waiver alone will serve as the basis for an award of "fees for fees." If so, this case will provide no occasion to consider the question for which certiorari is sought; if not, it will be time then for this Court to decide whether the issue merits certiorari. Even where a remand is not necessary, this Court sometimes orders such a remand in order to obtain clarification that may render unnecessary decision of federal issues. *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). A fortiori, where remand is necessary anyway, such remand and the clarification it may bring should precede consideration of whether certiorari is necessary.

2. The conflict in the Circuits asserted by the government as the basis for granting certiorari, upon examination, is no conflict at all. The Petition cites as decisions in conflict with the decision below cases from the Fifth, Seventh, Eighth and Ninth Circuits.

a. The Fifth Circuit's view is pure dictum expressed in a footnote. *Russell v. National Mediation Bd.*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985).



b. The Seventh, Eighth and Ninth Circuit decisions cited in the Petition, (*Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Cir. 1985); *Cornella v. Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Rawlings v. Heckler*, 725 F.2d 1192 (9th Cir. 1984)), arose prior to the 1985 amendments to the EAJA. The significance of these amendments to the question raised here was described by the Second Circuit as follows:

> Severing separate parts of the litigation for purposes of determining the availability of counsel fees is inappropriate in view of this congressional mandate to look not at the government's litigation position, but rather at the underlying action that spawned the litigation, in the first place. Were the government's litigation position the sole criterion for the award of fees, it might be justified to look at different phases of the litigation separately to determine whether the litigation position in each phase was "substantially justified." But since the litigation position is no longer the relevant criterion, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

*Trichilo v. Secretary of Health & Human Servs.*, 823 F.2d 702, 708 (2d Cir. 1987)•

c. In the context of the facts here, there is no conflict between the decision in this case and anything decided by the Seventh, Eighth and Ninth Circuits. In this case, the govern-

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• Although two Circuits—the Eighth and Ninth—have adhered to their prior decisions in cases decided after the 1985 amendments, they did so without further analysis and without considering the impact of the 1985 amendments on the "fees for fees" issue. *See National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 870 F.2d 542, 547-48 (9th Cir. 1989); *United States v. Estridge*, 797 F.2d 1454, 1459-60 (8th Cir. 1986). Since the only courts which have considered the impact of the 1985 amendments on "fees for fees" have adopted the *per se* rule, it may well be that "patience in the judicial resolution of conflicts may . . . produce the most desirable result." Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

ment failed to contest "fees for fees" in the district court, and therefore waived the issue. There is nothing in the latter cases indicating that in such a situation lack of substantial justification would have to be demonstrated as a condition for an award of "fees for fees."

3. The Eleventh Circuit's ruling on the issue of "fees for fees" is not only consistent with the prevailing view in the circuits, it is correct. This Court has admonished that a request for attorney's fees should "not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Petitioner's argument that a "*per se* rule" will protract litigation by encouraging parties to file unreasonable fee requests since "the government will have to bear all the costs of litigating them" (Pet. at 15) misstates the rule adopted by the court below, which held that "the United States may not oppose a 'fee for fees' request solely on the ground that its position in the fee litigation was substantially justified." (Pet. App. at 41a). The government remains free to challenge the reasonableness of such awards. As the court in *Trichilo* noted, "[i]f counsel makes inflated or outrageous fee demands, the court could readily deny compensation for time spent in pressing them, since that time would not have been 'reasonably spent.' " 823 F.2d at 708. That a far greater risk of meritless litigation is posed by the government's freedom to litigate infinitely the "substantial justification" issue is amply in evidence here. This case demonstrates the wisdom of the Eleventh Circuit's adoption of the view that "in most cases a loss on the generous 'substantially justified' EAJA threshold strongly indicates that the government is clinging to an unreasonable position." (Pet. App. at 38a-39a).

4. In any event, the merits of this rule may soon be resolved by the legislature. There is pending in Congress a bill entitled The Legal Fees Equity Act of 1989 which is intended to govern and clarify all federal fee-shifting statutes. In its present form, the legislation would resolve the issue of "fees for fees" by requiring that a party seeking fees show, among other things, that "the work for which the award of attorneys' fees and related expenses is sought . . . was performed . . . in connection with issues upon which the party prevailed against the



United States. . . ." S. 90, 101st Cong., 1st Sess. § 5(2) 135 Cong. Rec. S415 (daily ed. Jan. 25, 1989) (Resp. App. 6a). It would be an unnecessary and imprudent use of this Court's limited certiorari jurisdiction to review an issue that is presently under consideration by the legislature.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN
& WEINGER, P.A.
Plaza 2559
2650 Southwest 27th Avenue
Miami, Florida 33133
(305) 444-0060

BRUCE J. WINICK, ESQ.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

IRWIN P. STOTZKY, ESQ.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2549

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
One New York Plaza
New York, New York 10004
(212) 820-8000

By: Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.
Sandra M. Lipsman, Esq.

# APPENDIX

## S. 90

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as "The Legal Fees Equity Act of 1989".

SEC. 2. FINDINGS AND PURPOSES.

(A) Congress hereby finds and declares that—

(1) many Federal statutes authorize awards of attorneys' fees to be made to parties who prevail against the United States, or against State or local governments, in judicial and administrative proceedings;

(2) the failure to provide standards to guide courts and administrative bodies in awarding such fees has led to inconsistent interpretations of these Federal civil fee-shifting statutes, and in many instances to excessive awards of attorneys' fees under them;

(3) it is inappropriate for the Federal Government to impose on State and local governments the statutory requirement to pay awards of attorneys' fees without providing standards by which to make such awards;

(4) the limitation of $75 per hour prescribed by Congress for civil judicial and administrative proceedings under the Equal Access to Justice Act provides a reasonable and appropriate maximum hourly rate for the award of attorneys' fees against the United States, or against State or local governments, in judicial or administrative proceedings;

(5) it is inappropriate for awards of attorneys' fees to be made to parties who have prevailed on the merits of their complaint against the United States, or against State or local governments, in judicial or administrative proceedings;

(6) it is appropriate that parties in judicial or administrative proceedings against the United States, or against State or local

governments, pay a reasonable portion of their attorneys' fees when monetary awards are recovered;

(7) statutory provisions are necessary to control the circumstances and conditions under which awards of attorneys' fees and related expenses or costs may be made against the United States, or against State or local governments, in judicial or administrative proceedings; and

(8) statutory amendments are also appropriate to limit the circumstances in which Federal agencies hire outside private counsel from litigation and the amounts at which such outside counsel can be paid.

(b) It is the purpose of this Act—

(1) to establish a uniform hourly rate that shall be the maximum compensation authorized to be awarded against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies;

(2) to require that awards of attorneys fees against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies be made only to parties who have prevailed in the proceedings;

(3) to prescribe standards for the awarding of attorneys' fees and related expenses or costs against the United States, or against State or local governments, in judicial or administrative proceedings to which any Federal fee-shifting statute applies; and

(4) to authorize the Attorney General to promulgate regulations governing the circumstances in which Federal agencies can retain outside private counsel for litigation and to impose a uniform limit on the rates such counsel can be paid from appropriated funds.



SEC. 3. DEFINITIONS.

For the purpose of this Act—

(1) "attorneys' fees" means fees attributable to professional legal services performed by a person, or persons, licensed to practice law (but shall not include services by pro se claimants), or to services by enrolled tax practitioners with respect to proceedings before the United States Tax Court, including overhead expenses, as defined in this Act, but not including related expenses;

(2) "fee-shifting statute" means any Federal statute that provides for recovery by a party of attorneys' fees or related expenses against the United States, or against a State or local government;

(3) "overhead expenses", except in extraordinary circumstances, shall include, but not be limited to, rent or mortgage payments, maintenance (including heating and cooling costs), furniture and supplies, reporters, treatises, and other books, secretarial and other clerical and librarian time (including computer word processing expenses), telephone services and calls, and mailing expenses;

(4) "related expenses" means those expenses that may be awarded pursuant to a Federal law, and which are actually incurred by the attorney in connection with judicial or administrative proceedings, but does not include attorneys' fees or overhead expenses, as defined in this Act, or costs enumerated in section 1920 of title 28, United States Code;

(5) "party" means, for purposes of judicial proceedings, a party as defined by rule 17 of the Federal Rules of Civil Procedure, or, for purposes of administrative proceedings, a party as defined in section 551(3) of title 5, United States Code;

(6) "judicial proceeding" means a civil proceeding in any court or under the jurisdiction of a judicial officer, in which a party may by law be awarded attorneys' fees or related expenses;

(7) "administrative proceeding" means any proceeding, other than a judicial proceeding, in which a party may by law be awarded attorneys' fees or related expenses;

(8) "administrative officer" means the official(s) or person(s) authorized by statute or regulation to decide the substantive issues being considered in an administrative proceeding, or the official(s) or person(s) designated by the head of the agency as the administrative officer(s) for the purpose of this Act;

(9) "prevailed on the merits" means having obtained a final decision in which the party has succeeded on a significant issue or issues in the controversy and obtained significant relief in connection with that issue or issues, and may include, where the party is a defendant in a suit by the government, obtaining the dismissal of the complaint;

(10) "final decision" means a final judgment by the court, or a final order by an agency, in which a party establishes entitlement to relief on the merits of the claim or claims brought in the proceeding, and includes a judgment or order obtained by a party dismissing the proceeding with prejudice or pursuant to a settlement agreement;

(11) "United States" means the United States, or any agency of the United States, or any official of the United States acting in his or her official capacity;

(12) "State" means any State government, or any agency of the State government, or any official of the State government acting in his or her official capacity, and includes the territories and the District of Columbia; and

(13) "local government" means any county, city, town, municipality, municipal corporation, school board, special governmental district, or other political subdivision created by a State, or any agency of such entity, or any official of such entity acting in his or her official capacity.



SEC. 4. SCOPE AND APPLICATION; RELATIONSHIP TO OTHER LAWS.

(a) The provisions of this Act—

(1) apply to any judicial or administrative proceeding in which an award of attorneys' fees and related expenses is authorized, pursuant to any Federal fee-shifting statute, to be made against the United States, or a State or local government, and

(2) establish, minimum criteria and requirements for the award of attorneys' fees and related expenses to which this Act applies.

(b) Notwithstanding any other provision of law, no award of attorneys' fees or related expenses shall be made against the United States, or against State or local governments, in any judicial or administrative proceeding, except as expressly authorized by law (other than this Act), and in accordance with the provisions of this Act. No such award shall exceed the amount determined under the provisions of this Act.

(c) (1) The provisions of any applicable Federal fee-shifting statute that establish criteria or requirements in addition to those provided in this Act for the award of attorneys' fees and related expenses in such proceedings, or that otherwise limit awards of attorneys' fees in such proceedings, shall apply in addition to the provisions of this Act.

(2) Nothing in this Act shall be interpreted to create any right to, or provide any authority for, an award of attorneys' fees or related expenses in any judicial or administrative proceeding.

(d) No awards of attorneys' fees or related expenses shall be made under a Federal fee-shifting statute against a party who has intervened to defend the validity of a law or action of the United States, or a State or local government, and who has not been found to have violated a constitutional or statutory right of the party seeking the award.

(e) Awards of attorneys' fees and related expenses otherwise authorized under section 504 of title 5 of the United States Code or section 2412(d) of title 28 of the United States Code (the

Equal Access to Justice Act) shall be made in accordance with the provisions of this Act, except that subsections (a)(1), (b)(1)(C), (b)(2)(A), and (c) of section 6 of this Act shall not apply.

(f) The provisions of this Act shall not apply to compensation of attorneys in proceedings under section 3006A of title 18, United States Code.

SEC. 5. ALLOWANCE OF ATTORNEYS' FEES.

A party otherwise eligible to receive attorneys' fees and related expenses to which this Act applies must establish that—

(1) the party has prevailed on the merits against the United States, or against a State or local government;

(2) the work for which the award of attorneys' fees and related expenses is sought—

(A) was performed in the judicial or administrative proceeding in connection with issues upon which the party prevailed against the United States or against a State or local government, and

(B) was not excessive, redundant, or otherwise unnecessary to resolve the controversy; and

(3) the application for attorneys' fees and related expenses is made in accordance with sections 6(a) and 7 of this Act.

SEC. 6. AMOUNT OF ATTORNEYS' FEES.

(a)(1) No award of attorneys' fees against the United States, or against a State or local government, to which this Act applies shall exceed $75 per hour.

(2) Bonuses or multipliers shall not be used in calculating awards of attorneys' fees.

(b)(1) The Court or Administrative officer shall reduce or deny accordingly the amount of attorneys' fees and related expenses otherwise allowable if it is found that—



(A) The prevailing party, during the course of the proceeding, engaged in conduct that unreasonably protracted that final resolution of the controversy,

(B) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly salary of the attorney representing the party, or

(C) the time spent and legal services provided were excessive with regard to the nature of the controversy.

(2) The court or administrative officer, in the exercise of discretion, may reduce or deny an award where—

(A) the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or value of injunctive relief achieved in the proceeding, or

(B) a reduction or denial of the amount of attorneys' fees would otherwise be appropriate under the applicable fee-shifting statute.

(c) Whenever a monetary judgment is awarded in any judicial or administrative proceeding to which a Federal fee-shifting statute applies, a portion of the judgment (but not more than 25 per centum thereof) shall be applied to satisfy the amount of attorneys' fees authorized to be awarded against the United States, or against a State or local Government. If the authorized award of attorneys' fees exceeds 25 per centum of the judgment, the excess shall be paid by the United States, or the State or local government. This subsection shall not apply to awards of attorneys' fees pursuant to section 7430 of the Internal Revenue Code.

(d) Section 593(g) of title 28, United States Code, relating to independent counsel investigations, is amended by adding at the end thereof the following new sentence: "Such award shall not exceed $75 per hour.".

SEC. 7. TIMELY APPLICATIONS AND PROCEDURES

(a) In any judicial or administrative proceeding to which this Act applies, a party may seek an award of attorneys' fees and

related expenses only within thirty days after a final decision by the court or agency from which no appeal is taken. The party seeking an award of attorneys' fees shall submit to the court or agency such information as may be required by the court or agency.

(b) Courts and agencies shall develop procedures, not inconsistent with this Act, for filing of applications for awards of attorneys' fees, which shall provide guidance as to what information should be required to be submitted pursuant to subsection (a) of this section, when such information should be submitted, and when determinations should be made concerning awards of attorneys' fees and related expenses. In no event shall an award of attorneys' fees and related expenses be made prior to entry of a final decision by the court or agency.

SEC. 8. MOOTNESS AND SETTLEMENT DEFENSES.

No award of attorneys' fees and related expenses subject to the provisions of this Act may be made—

(1) where the Government demonstrates that—

(A) the claims have become moot due to a change in Government policy, and

(B) the pendency of the judicial or administrative proceeding was not a material factor in such change in policy; or

(2) for services performed subsequent to the time a written offer of settlement is made to a party, if the offer is not accepted and a court or administrative officer finds that the relief finally obtained by the party is not more favorable to the party than the offer of settlement.

SEC. 9. COMPTROLLER GENERAL REPORT.

The Comptroller General of the United States shall submit on April 1 of each year a report to the President and the Congress on the amount of attorneys' fees and related expenses awarded during the preceding fiscal year against the United States, or against State or local governments, in judicial and administrative proceedings to which this Act applies. The courts and each



agency shall provide the Comptroller General with such information as is necessary to comply with the requirements of this section.

SEC. 10. LIMITATION ON EMPLOYMENT AND COMPENSATION OF OUTSIDE, PRIVATE COUNSEL.

Section 3106 of title 5, United States Code, is amended to read as follows:

"§ 3106 Employment of attorneys; restrictions

"(a) Except as otherwise authorized by law, the head of an executive department, military department, or other agency, including an independent agency, board, or commission may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

"(b) Notwithstanding any other provision of law—

"(1) an executive department, military department, or other agency, including an independent agency, board, or commission, shall not retain outside, private counsel for the conduct of judicial or administrative litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, except upon a certification of need by the Attorney General and in accordance with regulations promulgated by the Attorney General; and

"(2) no payment from appropriated funds to such outside, private counsel retained pursuant to subsection (b)(1) shall exceed $75 an hour.

"(c) The Attorney General, after consultation with the Office of Management and Budget, the Office of Personnel Management, and other interested agencies, and upon public notice and comment pursuant to section 553 of this title, shall promulgate regulations implementing this section, including—

"(1) the circumstances, terms, and conditions under which executive departments, military departments, and other agen-

cies, including independent agencies, boards, and commissions, are authorized to employ outside, private counsel to be paid from appropriated funds;

"(2) procedures for the receipt and prompt resolution of applications from any agency for a certification of need by the Attorney General, in a particular case or class of cases, authorizing the retention of outside, private counsel for litigation in circumstances not otherwise permitted under this section; and

"(3) the coordination of the use and availability of the expertise of attorneys within the executive branch of Government for litigation.

The regulations authorized by this subsection and the determinations of the Attorney General pursuant to such regulations shall not be subject to judicial review.

"(d) for the purposes of this section, the term 'outside, private counsel' means an attorney, firm, legal services organization, or association engaged in the practice of law other than as an employee of the United States.

"(e) This section does not apply to the employment and payment of counsel under section 1037 of title 10.".

SEC. 11. EFFECTIVE DATE.

The provisions of this Act shall apply to any award of attorneys' fees and related expenses incurred subsequent to the enactment of this Act, including those incurred after such date in actions commenced prior to such enactment.

No. 89-601

(3)

Supreme Court, U.S.
FILED
NOV 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY MEMORANDUM FOR THE PETITIONERS

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

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COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY MEMORANDUM FOR THE PETITIONERS

1. Respondents' brief in opposition asserts that the government has waived the issue presented in our petition—whether a separate finding that the government's position in the fee litigation was not substantially justified is a necessary prerequisite to an award of fees for the fee litigation—by failing to raise it below. That assertion is simply incorrect. The issue was raised in the district court and preserved in the court of appeals.

In the March 7, 1986, hearing on respondents' application for an award of attorneys' fees, government counsel asserted (2 Resp. C. A. App., Tab. 8, at 128):

> [H]ours expended on the fee application itself should be deleted from consideration of fees in this case.
>
> The Government's long-standing position on that score is that there is another test, and that is whether the Government's defense of the fee application was a reasonable one.

> To find that it was not, or to find that the Government's defense of the fee application is not substantially justified would require no less than that I come in here and concede everything in the application.
>
> We don't see that there is another way around that, and we believe that the fee application hours have to be deleted from the fee application.

Similarly, the government's Proposed Findings of Fact and Conclusions Of Law submitted on May 12, 1986, stated (at 39 para. 29):

> Time expended on preparing and pursuing a fee award is not compensable under EAJA unless the government's defense of the fee question is "not substantially justified." Fee litigation must be considered a separate entity from the litigation which engendered it and is subject to separate analysis.

The issue was also preserved on appeal. The government's opening appeal brief discussed the issue (at 53-54), noting that the district court's reliance (Pet. App. 84a) on a statement in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986), overlooked the fact that that portion of the *Haitian Refugee Center* case had been vacated in *Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986).[1] In light of what the brief characterized as the latter decision's "*sub silentio* adoption of the rule • • • that a plaintiff is not entitled to fees under EAJA for time spent on a fee petition, unless the government's defense to that fee petition lacked substantial justification," the brief proceeded to contend that no fees for work on the fee application were appropriate here, because "[o]ur position in response to [respondents'] fee application • • • plainly meets the substantial justification test" (Gov't C.A. Br. 54). See also Gov't C.A. Reply Br. 21-24.

[1] The court of appeals recognized the accuracy of that assertion. Pet. App. 38a.



In the court of appeals, respondents advanced the identical waiver argument they present to this Court.[2] The court of appeals found that argument unworthy of discussion, and addressed the merits of our "fees for fees" argument. Pet. App. 37a-41a. This Court should also consider our argument on the merits.

2. Respondents contend that the 1985 Amendments to EAJA have eliminated the pre-existing conflict in the circuits on the fees for fees issue. They nevertheless concede (Br. in Opp. 5 n.*) that two circuits have since 1985 reaffirmed their prior positions—which are inconsistent with the result reached by the court of appeals in this case. The conflict therefore persists. That is hardly surprising, since the change in EAJA upon which respondents rely is not relevant to the fees for fees issue.[3]

3. Finally, respondents cite and append (Br. in Opp. App. 1a-10a) a pending bill, The Legal Fees Equity Act of 1989 (S. 90, 101st Cong., 1st Sess. (1989)), which they contend "would resolve the issue of 'fees for fees' " (Br. in Opp. 6). Respondents do not explain the relevance of the provision on which they rely (§ 5(2)(A)), which simply requires that the party seeking fees must show that the work for which an award is sought was performed "in connection

[2] There, as here, respondents relied on the district court's statement (Pet. App. 85a) that the government did not challenge the "fees, costs, or expenses." In context, what the district court apparently meant by this statement was only that the government did not contest the *amounts* claimed, as distinct from objecting to an award of fees for fees at all.

[3] The 1985 Amendments clarified the definition of "position of the United States" to include not only the government's position in the "civil action," but also "the action or failure to act by the agency upon which the civil action is based." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c)(2)(B), 99 Stat. 185. The addition obviously has no effect on the question of the proper way to treat work on the fee application, which has nothing to do with the underlying agency action.

with issues upon which the party prevailed" (Br. in Opp. App. 6a), and thus would apparently codify the apportionment rule of *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). Accordingly, even if the proposed bill were enacted, it would not affect the issue presented in our petition.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
*Solicitor General*

NOVEMBER 1989

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No. 89-601

Supreme Court, U.S.
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OCTOBER TERM, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## JOINT APPENDIX

IRA J. KURZBAN
*Kurzban, Kurzban & Weinger, P.A.*
*Plaza 2559*
*2650 Southwest 27th Avenue*
*Miami, Florida 33133*
*(305) 444-0060*

BRUCE J. WINICK
*University of Miami School of Law*
*P.O. Box 248087*
*Coral Gables, Florida 33124*
*(305) 284-2971*

IRWIN P. STOTZKY
*University of Miami School of Law*
*P.O. Box 248087*
*Coral Gables, Florida 33124*
*(305) 284-2549*

ROBERT E. JUCEAM
TERRENCE A. CORRIGAN
SANDRA M. LIPSMAN
*Fried, Frank, Harris, Shriver & Jacobson*
*One New York Plaza*
*New York, New York 10004*
*(212) 820-8000*

*Counsels for Respondents*

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

*Counsel for Petitioners*

**PETITION FOR CERTIORARI FILED OCTOBER 13, 1989**
**CERTIORARI GRANTED JANUARY 22, 1990**

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* The district court's corrected memorandum opinion and order on attorney's fees, costs and expenses (filed October 1, 1986) was printed in the appendix to the petition for a writ of certiorari and are not included herein. Likewise, the court of appeals' opinion (filed December 27, 1988), judgment (filed February 2, 1989) and the order denying petition(s) for rehearing and suggestion(s) for rehearing en banc (filed May 17, 1989) are printed in that appendix and not reproduced herein.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

---

Civil Action No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

---

**DOCKET ENTRIES**

---

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1981 | | |
| JUN 10 | 1 | HABEAS Corpus Petition, Copy mailed to Atty. Gen. w/o affidavit f/p fw |
| 10 | 2 | EMERGENCY motion for a stay of exclusion and deportation and for a hearing thereon, by petitioners. fw |
| 10 | 3 | MEMORANDUM in support of em. mot for stay of exclusion and deportation and for hearing, by petitioners. |
| 11 | 4 | NOTICE to produce documents at hrg., by petitioners. fw |
| 11 | 5 | NTOICE to produce witnesses at hrg., by petitioners. fw |
| 16 | 6 | AMENDED PETITION for Writ of Habeas Corpus and Complaint for declaratory, injunctive and mandatory relief—class action by pltfs. fw |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 16 | 7 | NOTICE to produce witnesses @ trial, by pltf. fw |
| 16 | 8 | NOTICE of taking depositions of Doris Meissner 8/13/81 @ 9:00 AM; David Crosland 8/14/81 @ 9:00 AM; Hon. Joseph W. Monsanto on 8/10/81 @ 9:00 AM; Hon William Nail 8/10/81 @ 1:00 PM; Joe Howerton 8/11/81 @ 9:00 AM and Fred Alexander 8/11/81 @ 1:00 PM, by pltf. fw |
| 16 | 9 | NOTICE to produce upon defts, by pltf. fw |
| 16 | 10 | INTERROGS and request for admission upon defts, by pltf. fw |
| 16 | 11 | NOTICE to produce add. witness at trial, by pltf. fw |
| 17 | 12 | SUMMONS issued to<br>Doris Meissner<br>Fred Alexander<br>Immigration & Natz.<br>Lee Rowland<br>William French Smith—U.S. Atty General<br>Joe D. Howerton<br>U.S. Atty. fw |
| 18 | 13 | TRIAL MEMO, by respondents. fw |
| 18 | 14 | *RETURN* to amended petition for Habeas Corpus and motion to have parties dropped and claims severed in complt for declaration inj. & Mandaotry [sic] relief by fed defts. fw |
| 23 | 15 | RETURN of service exec. 6/22/81 as to Fred Alexander thru Ann Frank. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 23 | 16 | RETURN of service exec. 6/22/81 as to Lee Rowland thru Anne Frank. fw |
| 23 | 17 | RETURN of service exec. 6/22/81 as to Joe D. Howerton thru Anne Frank. fw |
| 23 | 18 | RETURN of service exec. 6/22/81 as to Immigration & Natz thru Anne Frank. fw |
| 26 | 19 | MOTION for leave to file amended petition for writ of habeas corpus and complaint for declaratory, inj. & mandatory relief—class action by petitioners & pltfs. fw |
| 26 | 20 | MOTION to maintain the amended petion for habeas corpus as class action by plfts & petitioners. fw |
| 26 | 21 | MEMO in support of mot to maintain amended petition for habeas corpus as class action, by petitioners. fw |
| 26 | 22 | MEMO in support of mot for leave to file amended petition and on various procedural issues, by petitioners & pltfs. fw |
| 29 | 23 | MOTION to maintain the amended petition for habeas corpus as class action, by pltf. fw |
| 30 | 24 | TRANSCRIPT of Emergency Hrg. before Judge Hastings on 6/12/81 @ 9:30 AM pgs. 1 thru 67. |
| JULY 7 | 25 | MEMO in response to pltfs' mot to certify class, by defts. fw |
| 7 | 26 | FINDINGS of fact: (ALH) Respondents' motion to have ptys dropped and |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | claims severed Denied. Respondents have 60 days to prepare and respond to new claims raised in amended petition. (EOD 7/8/81-CCAP) fw |
| 9 | 27 | ORDER (ALH) motion of respondents granted subpoenas served on William Nail and Joseph Monsanto hereby Quashed. (EOD 7/10/81-CCAP) fw |
| JULY 10 | 28 | MOTION to vacate petitioners' final orders of exclusion and to remand to immigration & naturalization service, by respondents. NR #38 fw |
| 10 | 29 | MEMO in support of respondents' motion to vacate and remand, by respondents. fw |
| 17 | 30 | MOTION for TRO, by pltf. fw |
| 20 | 31 | RETURN of summons exec. thru certified mail #0207873 as to Doris Meissner, of I&N 6/18/81. fw |
| 20 | 32 | RETURN of summons exec. thru certified #0207872 as to U.S. Atty & Atty General 6/22/81. fw |
| 27 | 33 | RESPONSE to pltfs' motion for TRO, by deft. fw |
| AUG. 6 | 34 | MOTION to file memo in support of TRO in excess of 20 pgs., by pltf. fw |
| 6 | 35 | MOTION for TRO, by pltf. fw |
| 6 | 36 | MEMO in support of Motion for TRO and in response to deft's reply, by plft. fw |
| 6 | 37 | CONSENT MOTION and memo for ext. of time within which to respond to discovery requests, by fed defts. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 10 | 38 | ORDER (ALH) defts' mot to vacate pltfs' final orders of exclusion and Remand to Immigration and Naturalization service for any lawful proceeding hereby Granted. (EOD 8/11/81-CCAP-N) fw |
| 11 | – | TRANSMITTAL letter sent to I&N Service fw |
| 12 | 39 | MOTION for preliminary injunction, by pltfs. fw |
| 12 | 40 | RESPONSE to defts' notice of filing and memo of law in support of pltfs' motion for preliminary injunction, by pltfs. fw |
| JULY 20 | 41 | RESPONSE to respondents' motion to vacate petitioners' final orders of exclusion and to remand to Immigration & Naturalization Service, by petitioners. fw |
| AUG. 18 | 42 | MOTION for enlargement of time and for continuance of hrg on prel inj., by defts. fw |
| 18 | 43 | NOTICE of hrg. on prel. inj. 8/20/81 @ 9:00 AM, by MC Clerk. fw |
| 20 | 44 | NOTICE of filing additional affidavits, by petitioners. fw |
| 20 | 45 | CERTIFICATE of filing add. interrogs and request for admissions, by petitioners. fw |
| 24 | 46 | NOTICE of filing affidavits, by defts. fw |
| 24 | 47 | EMERGENCY motion to compel and for continuance of hrg. on class cert. by pltf's. fw |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 24 | 48 | MEMO in response to motion for prel inj. and for class certification, by defts. fw |
| 24 | 49 | RESPONSE to em. mot to compel and for cont. of hrg. of class cert. by defts. fw |
| 24 | 50 | SUPPLEMENTAL pldg and 2nd AMENDED COMPLT for declaratory, inj. & Mandatory relief—class action, by petitioners. fw |
| 24 | 51 | MOTION for leave to file supplemental pldg and 2nd am. complt., by plfts. fw |
| 24 | 52 | MEMO of law in support of mot for leave to file supplemental pldg and 2nd amended complt, by petitioners. fw |
| 24 | 53 | MEMO in support of mot for class action cert., by pltfs. fw |
| 24 | 54 | ORDER (ALH) defts shall produce documents requested no later than 8/26/81. Defts shall answer all interrogs and req. for adm. no later than 8/26/81. Rescheduled hrg on class cert. for 9/21/81 @ 9:30 AM, (EOD 8/26/81-CCAP) fw |
| 25 | 55 | NOTICE of tkg depos. on 8/31/81 of Steven D. Forester @ 4:00 PM. Gerard Jean-Juste @ 3:00 PM; on 8/27/81 beginning @ 9:00 AM of Jean Louis Servebian, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joseph Calixte, Lemol LeBlanc and Wadestrad Lombard and again on |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | 8/31/81 @ 1:00 PM of Laurel D. and Albert J. Krieger @ 2:00 PM. of Vera A. Weisz, by defts. fw |
| 26 | 56 | MOTION for reconsideration and for an expedited hrg. and for prot order, by respondents. fw |
| 26 | 57 | MEMO in support of mot for reconsideration, by respondents. fw |
| 28 | 58 | MEMO in opp to defts' motion for reconsideration and protective order, by pltf's. fw |
| 28 | 59 | MEMO of law on standing of the Haitian Refugee Center, Inc., by pltfs. fw |
| 28 | 60 | MOTION for protective order, by Steven D. Forester. fw |
| 28 | 61 | MOTION for protective order, by Vera Weisz. fw |
| 28 | 62 | MOTION for protective order, by Jean Louis Servebian, Pierre Silien, Serge Verdieu, Milfort Vilgard, Joseph Calixte, Lemol Leblanc, and Wadestrad Lombard. (Pltf) fw |
| 31 | 63 | MOTION for civil contempt, by pltf. fw |
| 31 | 64 | MOTION and memo for clarification and notice of filing, by defts. fw |
| *JUN. 17 | 65 | TRANSCRIPT of hrg. before Judge Hastings on 6/17/81 @ 10:00 AM pgs 1 thru 105. fw |
| SEPT. 1 | 66 | TRANSCRIPT of hrg. before Judge Hastings on 6/22/81 @ 10:00 AM Vol. 2 pgs 1 thru 291. fw |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 1 | 67 | TRANSCRIPT of hrg. before Judge Hastings on 6/23/81 @ 10:00 AM Vol. 3 pgs 1 thru 226. fw |
| 1 | 68 | TRANSCRIPT of hrg. before Judge Hastings on 6/24/81 @ 10:00 AM Vol. 4 pgs. 1 thru 141. fw |
| 1 | 69 | TRANSCRIPT of hrg. before Judge Hastings on 6/29/81 @ 9:30 AM Vol. 5 pgs. 1 thru 101. fw |
| 2 | 70 | SUPPLEMENTAL memo in support of mot for prel inj and in response to defts' 1st amendment argument, by pltf. fw |
| 2 | 71 | NOTICE of filing additional affidavits, by pltf. fw |
| 2 | 72 | NOTICE to produce at trial, by pltfs. fw |
| 2 | 73 | NOTICE of filing supplemental affidavits in support of mot for prel inj., by pltfs. fw |
| 3 | 74 | DEPOSITION of Kathy Price taken 9/1/81 @ 12:05 AM. w/attachment. fw |
| 3 | 75 | DEPOSITION of Cecilio L. Ruiz, Jr. taken 8/31/81 @ 6:00 PM. fw |
| 3 | 76 | DEPOSITION of Laurel D. White taken 8/31/81 @ 1:30 PM. fw |
| 3 | 77 | DEPOSITION of Leroy Frederick taken 8/31/81 @ 3:10 PM. fw |
| 3 | 78 | DEPOSITION of Alan Friess taken 8/26/81 @ 10:15 AM. w/exhibit. fw |
| 3 | 79 | DEPOSITION of Joseph W. Monsanto taken 9/1/81 @ 2:30 PM. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 8 | 80 | DEPO of Jeffrey Goldstein, taken 9/1/81 @ 9:30 AM. fw |
| Sept. 4 | 81 | DEPO of Serge Vedieu taken 9/2/81 @ 12:55 PM. fw |
| 4 | 82 | DEPO of Cestmo; LeBlanch taken 9/2/81 @ 12:45 PM. fw |
| 4 | 83 | DEPO of Vilgard Milfort taken 9/2/81 @ 12:20 PM. fw |
| 4 | 84 | DEPO of Wagestrand Lombard taken 9/2/81 @ 12:10 PM. fw |
| 4 | 85 | DEPO of Pierre Silien taken 9/1/81 @11:15 AM. fw |
| 4 | 86 | DEPO of Severbien Jean Louis taken 9/1/81 @ 10:00 PM. fw |
| 4 | 87 | DEPO of Steven David Forester taken 9/1/81 @ 6:40 PM. fw |
| 8 | 88 | NOTICE of filing add. affidavits, by pltfs. fw |
| 9 | 89 | NOTICE of filing add. affidavits, by pltfs. fw |
| 9 | 90 | ORDER (ALH) Granting pltf's mot for leave to file supp pldg and 2nd amended complt. (EOD 9/15/81-CCAP) fw |
| 9 | 91 | TRANSCRIPT of hrg. 9/2/81 before Judge Hastings pgs 1 thru 156. fw |
| 15 | 92 | TRANSCRIPT 0 hrg. 9/8/81 @ 4:40 PM before Judge Hastings pgs 1 thru 192. Vol. I. fw |
| 18 | 93 | LETTER to Judge Hastings re: Fils-Aime Schiller from Vera A. Weisz.fw |
| 18 | 94 | RENEWED Mot for civil contempt as to defts for non compliance w/previous court orders, by pltfs. fw |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 18 | 95 | WRITTEN submission pursuant to 28 C.F.R. 16.21, by plfts. fw |
| 18 | 96 | NOTICE of tkg depos on 9/25/81 of Frank Lyons @1:30 and James Spear @ 3:30 PM; 9/28/81 of Hugh Brian @ 10:00 AM and Paul Schmitd @ 1:00 PM and Joan Arrowsmith @ 3:00 PM; on 10/1/81 of Francis Maiolo @ 10:00 AM, Tom Ragnow on 10/2/81 @ 9:30 AM & Gordon Sacks @ 3:00 PM and on 10/5/81 of Joe Howerton @ 9:00 AM, Hon. Neil Foster @ 1:00 PM and Hon Henry Scroope @ 4:00 PM, by pltfs. fw |
| 21 | 97 | MOTION to Intervene, by Southern Cristian Leadership Conference. (Complaint of intervenors attached). rw |
| 21 | 98 | MOTION to waive court costs, by Southern Cristian. rw |
| 21 | 99 | REQUEST for admissions, by Southern Cristian. rw |
| 21 | 100 | TRANSCRIPT of proceedings at hearing on 9/9/81. (Pages 1-126). rw |
| 21 | 101 | TRANSCRIPT of proceedings at hearing on 9/3/91. (Pages 1-67). rw |
| 22 | 102 | AFFIDAVIT of Vera Weisz re deportation of Haitians. rw |
| 22 | 103 | EMERGENCY MOTION for stay of deportation and for a hearing thereon, by Pltfs. rw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 22 | 104 | ORDER (SMA) granting stay 9/24/81 of deportation. (EOD-9/28/81-CCAP). rw |
| 25 | 105 | CONSENT MOTION for ext of time to 9/25/81 to answer, with memo, by defts. rw |
| 25 | 106 | CONSENT motion for ext of time to 9/28/81, with memo, by defts. rw |
| 28 | 107 | Copy of letter to the court from defts re order of 9/9/81. rw |
| 28 | 108 | MOTION to dissolve temporary Restraining order, by defts. rw |
| 28 | 109 | MEMO in support of above motion, by defts. rw |
| 30 | 110 | MOTION to strike M/DS and to enter default judgment. rw |
| 30 | 111 | Motion to compel, by plfts. rw |
| 30 | 112 | CONSENT MOTION and memo for ext of time to resp to mot to intervent, by defts. rw |
| 30 | 113 | MOTION to dismiss or transfer, by defts. rw |
| 30 | 114 | MEMO in supp of their mot to dismiss or transfer and for trial, by defts. rw |
| 30 | 115 | ORDER (ALH) granting temporary restraining order. (EOD-10/5/81-CCAP). rw |
| Sep. 30 | 116 | ORDER (ALH) granting pltfs' Motion for Class Certification. Class is certified and defined as noted herein. (EOD-10/5/81-CCAP). rw |
| Oct. 1 | 117 | MOTION for clarification of Court's order granting class certification, by pltfs. rw |

| DATE | NR | PROCEEDINGS |
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| 2 | 118 | SUPPLEMENTAL with respect to vol withdrawals, by defts. rw |
| 6 | 119 | ORDER (ALH) : TRO entered 9/30/81 has dissolved and is converted into and to be cont'd as a Preliminary injunction. Defts are enjoined from deporting all Haitian aliens who have arrived in the Southern District of Florida on or after 5/20/81 who applying for entry into the U.S. and presently held in detention facilities. See order for further details. (EOD-10/10/81-CCAP). rw |
| 7 | 120 | MOTION for ext of time to resp to pltfs' motions, by defts. rw |
| 7 | 121 | RESPONSE to order to produce, by defts. rw |
| 6 | 122 | NOTICE of In Camera submission on voluntary withdrawals, by defts. rw |
| 13 | 123 | NOTICE of filing supp. affidavit of Lawrence M. Linden, by pltfs. fw |
| 13 | 124 | MOTION to dissolve or modify the prel. inj. and TRO and immediate hearing, by defts. fw |
| 13 | 125 | MOTION and memo to file memo in excess of 20 pages, by defts. fw |
| 13 | 126 | MEMO in supp. of mot to dissolve or modify the prel inj. and TRO and for immediate hrg, by defts. fw |
| 14 | 127 | MOTION and memo for enl. of time to resp. to mot to intervene of Southern Christian Leadership Conf., by deft. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 14 | 128 | MOTION and memo for enl. of time to respond to pltfs' mot for cert. of class, by deft. fw |
| 19 | 129 | MEMO in opp to motion to compel prel. statement, by defts. fw |
| 19 | 130 | MOTION & memo for ext. of time, by defts. fw |
| 19 | 131 | REPLY to pltfs' renewed motion for civil contempt, by defts. fw |
| 19 | 132 | REPLY to pltfs' motion to dismiss and to enter default judgment, by defts. fw |
| 19 | 133 | NOTICE of filing documents enumerate in defts' resp to Order to produce on 10/7/81, by deft. fw |
| 19 | 134 | NOTICE of tkg depo of Charles Sava 10/23/81 @ 10:00 AM, by pltfs. fw |
| 20 | 135 | MEMO in opp to motion to intervene by Southern Christian Leadership Conf., by deft. fw |
| 20 | 136 | RESPONSE to pltfs' mot for clarification of crt's order granting class certification, by defts Doris Meissner, et al. sj |
| 22 | 137 | DEPOSITION of Judge Neale S. Foster taken 10/5/81 @ 10:10 AM. fw |
| 22 | 138 | DEPOSITION of Henry G. Scroope, Jr. taken 10/5/81 @ 2:10 PM. fw |
| 21 | 139 | LETTER to Richard A. Marshall. AUSA re: "voluntarily return" to Haiti, from Ira J. Kurzban. fw |
| 23 | 140 | NOTICE of tkg depo on 11/4/81 @ 1:00 PM of Patrick Baussan, @ 10:00 AM of Pierre M. Armand; on |

| DATE | NR | PROCEEDINGS |
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| | | 11/6/81 @ 3:00 P.M. of Phillip Talleyrand @ 10:00 AM of Gary Menard and on 11/13/81 @ 10:00 AM of Rev. Jean Juste., by defts. fw |
| 27 | 141 | DEPOSITION of Ernest Michael Trominiski taken 8/27/81 @ 2:30 PM. fw |
| 27 | 142 | LETTER to Mr. Kurzban re: provide you w/notice should Haitians desire to return to Haiti, from R. Marshal, Jr. AUSA. fw |
| OCT. 28 | 143 | ORDER (CA for ALH) pltfs to respond within 5 days to motion to dissolve or modify prel inj and TRO. (EOD 10/29/81-CCAP) fw |
| 29 | 144 | MOTION to enlarge time to answer defts' mot to dissolve prel inj, by pltfs. fw |
| 29 | 145 | NOTICE of supp. citation for defts' memo in supp. of mot to dismiss or transfer and for trial, by defts. fw |
| 29 | 146 | MOTION to file memo in opp to defts' memo in supp. of their mot to dismiss or transfer and for trial in excess of twenty pages, by plfts. fw |
| 29 | 147 | MEMO in opp to defts' memo in supp. of their mot to dismiss or transfer and trial, by pltfs. fw |
| 30 | 148 | EMERGENCY MOTION and memo to shorten time for pltfs' to respond to motion to dissolve prel inj & TRO and for immediate hrg., by defts. fw |
| 30 | 149 | MOTION to shorten time to comply w/discovery requests w/memo, by defts. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 30 | 150 | CERTIFICATE of service for discovery requests by defts. fw |
| 30 | 151 | INTERROGS and requests to produce documents, by defts. fw |
| * 29 | 152 | ORDER (CA for ALH) pltf shall have 14 day ext. to resp. to defts' mot to dissolve prel inj. (EOD 11/2/81-CCAP) fw |
| NOV 2 | 153 | EMERGENCY motion for stay and for continuance of TRO, w/memo, by pltfs. fw |
| 4 | 154 | MOTION & memo for emergency hrg. on defts' mot to dissove prel inj. and TRO for immediate hrg w/memo, by defts. fw |
| 5 | 155 | ORDER (SMA) action defts outline in letter to Chief Justice 10/29/81 deportation and repatriation of four hundred (435) Haitian aliens who defts claim wish to w/draw appl. for admission to USA and return to Haiti prohibited by previous orders of Judge Hastings. (EOD 11/5/81-CCAP) fw |
| 5 | 156 | NOTICE of status conference on 11/6/81 @ 9:00 AM before Judge Kehoe on defts mot to dissolve prel inj, etc., by defts. fw |
| 6 | 157 | RESPONSE to defts' motion to shorten time to comply w/discovery requests w/memo, by pltf. fw |
| 9 | 158 | LETTER to Mr. Marshal re: to inform you that as of 5:00 pm on 11/5/81 |

| DATE | NR | PROCEEDINGS |
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| | | neither Phillip Talleyrand nor Gary J. Enard have been served w/notices of deposition for 11/6/81, by Haitian Refugee Ctr. Vera A. Weisz. fw |
| 9 | 159 | NOTICE to produce witnesses at trial 11/9/81 @ 3:00 PM, by petitioners. fw |
| 11 | 160 | LIST of proposed questions, by defts. fw |
| 11 | 161 | QUESTIONS to be presented to special master. by pltfs. fw |
| 11 | 162 | NOTICE of filing affidavit of Bonny Depeine, by pltfs. fw |
| 12 | 163 | MEMO in opp to defts' mot to dissolve or modify the prel inj. and TRO and for immediate hrg., by pltfs. fw |
| 13 | 164 | REPLY memo in supp. of pltfs' mot to compel tkg of depos, by pltfs. fw |
| NOV. 13 | 165 | DEPOSITION of Doris M. Meissner taken 9/1/81. fw |
| 13 | 166 | NOTICE of filing depo of David W. Crosland, III 9/1/81, by defts. fw |
| * 2 | 167 | LETTER to Judge Atkins re: repatriating Haitians who have withdrawn their applications for admission, from Richard A. Marshall, Jr. AUSA. fw |
| * 2 | 168 | LETTER to Judge Aronovitz re: Prepared to transport Haitians from USA and Puerto Rico wishing to return to Haiti from Richard A. Marshall, Jr. AUSA. fw |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| 13 | 169 | ORDER (JWK) apptg special master-Joel Hirschhorn, Esq. and interpreter Viviane Boulos special master's interpreter. (EOD 11/17/81-CCAP) fw |
| 14 | 170 | ORDER (JWL) Modifying prel inj. as to those Haitians having withdrawn applications for admission (List attached). (EOD 11/17/81-CCAP) fw |
| 19 | 171 | MOTION and memo of law to assign this case to a Judge for all purposes, by Govt. fw |
| 19 | 172 | CERTIFICATE of service, by USA. fw |
| 19 | 173 | MOTION for class action decertification, by deft. fw |
| 19 | 174 | MEMO of law in support of mot to decertify class and for hrg., by Govt. fw |
| 24 | 175 | MEMO in response to defts' motion to modify prel inj as to Haitians seeking voluntary repatriation at Ft. Allen, PR., by pltfs. fw |
| 23 | 176 | ORDER (JWK) Modifying prel inj.: as to those individuals whose names and Immigration "A" file nos. are listed on attached schedule. (EOD 11/25/81-CCAP) fw |
| 24 | 177 | MOTION to modify prel inj. as to Haitians seeking vol. repatriation at Ft. Allen, PR., by defts. fw |
| 25 | 178 | NOTICE of filing corrected mot and memo to modify prel inj. as to Haitians seeking voluntary repatriation at Ft. Allen, by defts. fw |

| DATE | NR | PROCEEDINGS |
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| 25 | 179 | MOTION to modify prel inj. as to Haitians seeking vol. repatriation at Ft. Allen, P.R., by defts. fw |
| 25 | 180 | MEMO in supp. of mot to modify prel inj. as to Haitians seeking repatriation at Ft. Allen, P.R., by defts. fw |
| 25 | 181 | ORDER (JWK) Deft's mot to modify prel inj Granted and defts may immediately repatriate upon entry of this order all Haitians located at Fort Allen, P.R. who have or will w/draw appl. for adm. into U.S. Finds this cause certified as class action. (EOD 12/1/81-CCAP) fw |
| DEC. 2 | 182 | CERTIFICATE of service of motion to decertify class and for hrg., by pltfs. fw |
| 3 | 183 | ORDER OF REASSIGNMENT to Calendar of Judge Eugene Spellman. (EOD 12/3/81-CCAP, by P. T., Clerk. fw |
| Dec 7 | 184 | MOTION to reconsider order of 11/25/81, modifying repliminary injunction and to clarify and modify portions, and in the alternative for an injunction pending appeal; and memo in supp, by plfts. cs |
| 8 | 185 | MEMO in opp to mot for decertification and in supp of mot for clarification, by pltfs. cs |
| 8 | 186 | STATUS memo, by Government. cs |
| 7 | 187 | ORDER (EPS) setting status conference for 12/8/81, at 9:30. (EOD-12/9/81-CCAP). cs |



| DATE | NR | PROCEEDINGS |
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| 3 | 188 | CERTIFICATION of the Clerk JIB to reassign cause on a districtwide basis. Clerk notifies en banc that cause by virtue of random selection is reassigned permanently to EPS, and all pleadings hereinafter filed in cause to bear the number 81-1260-CIV-EPS. cs |
| 3 | 189 | ORDER (CCA) granting government's mot to reassign and reassignment. (EOD-12/9/81-CCAP). cs |
| 9 | 190 | ORDER (JWK): Pltfs mot for reconsideration of court's order of 11/25/81 modifying preliminary injunction is denied. (EOD-12/11/81-CCAP). cs |
| 11 | 191 | TRANSCRIPT of trial hearing on 1/25/81, Pages 2 thru 40. cs |
| 11 | 192 | TRANSCRIPT of trial hearing on 11/14/81, Pages 2 thru 40. cs |
| 11 | 193 | MOTION for leave to file memo in excess of 20 pages, by pltfs. cs |
| 11 | 194 | ORDER (EPS) granting pltf's mot to compel. (EOD-12/14/81-CCAP). cs |
| 11 | 195 | ORDER (EPS) for pretrial conference and notice of trial. P/T conference on 3/5/82, at 9:00. Non jury trial to begin on 3/15/82 at 9:00. (EOD-12/14/81-CCAP). cs |
| 11 | 196 | ORDER (ESP) denying pltf's mot to strike defts' mot to dismiss and for entry of a default judgment. (EOD-12/14/81-CCAP). cs |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 14 | 197 | MOTION and supp memo for ext of time within which to respond to pltf's mot for preliminary injunction and reply to pltf's mot to file a memo in excess of 20 pages, by Government. cs |
| 15 | 198 | RESPONSE to Government's mot and supp memo for ext of time within which to respond to pltfs' mot for preliminary injunction, by pltfs. cs |
| 15 | 199 | MOTION and supp memo for ext of time within which to respond to pltf's mot to reconsider the order of 11/25/81, by Government. cs |
| 15 | 200 | ORDER (EPS) granting mot for ext of time up to and including 1/8/82, in which to file responsive pleading. (EOD-12/16/81-CCAP). cs |
| 16 | 201 | STATUS report, by government. cs |
| DEC 17 | 202 | SECOND notice to produce, by pltfs. cs |
| 17 | 203 | STATUS report, by pltfs. cs |
| 17 | 204 | NOTICE of taking deposition as to the following: ,<br>January 20th, 1982.<br>Bureau of Prisons or INS Officer in charge of facility at 8:30.<br>Chief Legal Officer for INS at facility or in Dist Office 7 at 11:30.<br>District Director of District 7 at 2:00<br>Gordon Sacks, ILJ at 4:00. |



| DATE | NR | PROCEEDINGS |
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| | | January 21, 1982:<br>Bureau of Prisons or INS Officer in charge of facility at 12:00<br>Chief Legal Officer for INS at facility at 2:00<br>Chief INS Officer for area at 4:00.<br><br>January 22, 1982:<br>INS Officer in charge of facility at 8:30<br>Chief Legal Officer for facility at 11:00<br>Charles Sava, District Director at 2:00<br>James Spear, ILJ at 4:00<br>Frank Lyons, ILJ at 5:00.<br><br>January 25, 1982:<br>James Poulio at 9:00<br>INS Central Officer in charge of overseeing detention of Haitians at 11:00<br>Hugh Brian at 12:00<br>Alan Nelson at 2:00<br><br>January 26, 1982:<br>Paul Schmidt at 9:00<br>Joan Arrowsmith at 10:00<br>Tom Ragnow at 12:00<br>Rudolph Guiliani at 2:00<br><br>January 27, 1982<br>Bureau of Prisons or INS Officer in charge of facility at 12:00<br>Chief Legal Officer for INS at facility or in district at 2:00<br>District Director of area at 4:00 |

| DATE | NR | PROCEEDINGS |
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| | | January 29, 1982<br>Bureau of Prisons or INS Officer in charge of facility at 9:00<br>Chief Legal Officer for INS at facility or in district at 11:00<br>District Director for area at 1:00. |
| | | February 1, 1982<br>Bureau of Prisons or INS Officer in charge of facility at 9:00<br>Chief Legal Officer for INS at facility or in district at 11:00<br>District Director of area at 2:00. cs |
| | | February 2, 1982<br>Bureau of Prisons or INS Officer in charge of facility at 9:00<br>Chief Legal Officer for INS at facility or in district at 11:00<br>District Director for area at 2:00 |
| | | February 5, 1982<br>INS Officer in charge of facility at 9:00<br>Lolita Semidey at 11:00<br>District Director of District 27 at 2:00 |
| | | February 8, 1982<br>Assistant District Director Metcalf at 9:00<br>Chief Legal Officer, INS District 6 at 10:30<br>Joe Howerton at 12:00<br>Sidney Majure at 3:00. cs |
| 17 | 205 | NOTICE to produce, by pltfs. cs |
| 18 | 206 | STATUS Report re Motion to Intervene, by AUSA Moseley. pk |



| DATE | NR | PROCEEDINGS |
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| 21 | 207 | REPLY to pltfs' memo in opp to mot for decertification and in supp of mot for clarification, by defts. cs |
| 22 | 208 | RESPONSE to defts interrogatories, by pltfs. cs |
| 22 | 209 | RESPONSE to request for production, by pltfs. cs |
| 22 | 210 | ORDER (EPS) rendering Government's mot for ext moot. (EOD-12/29/81-CCAP). cs |
| 23 | 211 | ORDER (EPS) setting hearing on pltf's mot for preliminary injunction filed on 12/11/81. Hearing set on pltf's mot during two week period beginning on 1/18/82. Exact date date to be fixed at a future time. All proceedings will be held in North Courtroom of U.S. Dist. Courthouse. (EOD-12/29/81-CCAP). cs |
| 28 | 212 | NOTICE of taking deposition duces tecum of records custodian of INS on 1/11/82, at 4:00 cs |
| 28 | 213 | MOTION for expedited discovery, by pltfs and memo. cs |
| 31 | 214 | *ANSWER*, by defts Doris Messner, Joe Howerton, Lee Rowland, Fred Alexander and INS and William French Smith. cs |
| 30 | 215 | MOTION to compel discovery, by defts. cs |
| *1982* | | |
| Jan 4 | 216 | NOTICE of filing, by respondents. cs |
| 4 | 217 | MOTION for protective order with respect to the taking of depo, by government. cs |

| DATE | NR | PROCEEDINGS |
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| 4 | 218 | DECLARATION, by M. Demarco Johnson. cs |
| 4 | 219 | REPLY to mot for expedited discovery, by government. cs |
| 4 | 220 | ORDER (EPS): Cause is reset for hearing at 9:00 on 1/11/82. Deft shall indicate to court what information, sought by pltf, is available through INS computers with regard to Krome Avenue facility. Deft inform court what information is retrievable prior to date of hearing on mot for preliminary injunction is set to begin and which information can be available by trial date. All information retrievable prior to hearing shall be produced for pltf pursuant to this order. (EOD-1/8/82-CCAP). cs |
| 8 | 221 | SUPPLEMENTAL response to pltfs' mot for civil contempt, cs |
| 8 | 222 | MOTION and memo for leave to file a memo in excess of 20 pages, by U.S.A. cs |
| 8 | 223 | REPLY memo in opp to pltf's mot for preliminary injunction, by government. cs |
| 11 | 224 | RESPONSE to defts' opposition to expedited discovery, by pltfs. cs |
| 11 | 225 | MEMO in opp to defts' mot for protective order and for partial mot for civil contempt as to Paul Schmidt and INS judges., by pltf. cs |
| 13 | 226 | RESPONSE to deft's mot to compel, by pltf's. cs |



| DATE | NR | PROCEEDINGS |
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| 11 | 227 | ORDER (EPS): Deft provide to pltfs by 1/27/82 statistical info of undocumented and falsely documented aliens detained for exclusion hearings since 5/20/81, and those who have since been paroled, indicating nationality of the alien. Court notes defts mot to compel is presently rendered moot by pltfs' ans to interrog. Defts mot for a protective order with respect to taking deposition is granted. Pltfs' mot for order adjudging pltfs in civil contempt is held in abeyance by court, until court determines with certainty the scope of class to be certified in the case for purposes of trial. (EOD-1/14/82-CCAP). cs |
| 14 | 228 | NOTICE of filing, by government. cs |
| 14 | 229 | MOTION to consolidate hearing on mot for preliminary injunction with trial on the merits, by government. cs |
| 14 | 230 | AFFIDAVIT of Steven R. Abrams. cs |
| 15 | 231 | RE-NOTICE of tkg depos of James Pulio @9:00, INS Officer @11:00, Hugh Brian @12:00 and Alan Nelson @2:00 all on 1/22/82 in Washington, D.C., by pltfs. mc |
| 15 | 232 | MOTION to strike affirmative defenses, by pltfs. mc |
| 15 | 233 | NOTICE of filing declaration of Alan C. Nelson in oppo to pltfs' mot for prel injunction, by defts. mc |
| 18 | 234 | RESPONSE to second notice to produce, by pltfs. cs |

| DATE | NR | PROCEEDINGS |
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| 19 | 235 | RESPONSE to request for production of documents, by defts. cs |
| 19 | 236 | NOTICE of filing affidavit in opp to pltf's mot for a preliminary injunction. cs |
| 19 | 237 | REPLY to mot to strike affirmative defenses, by pltf. cs |
| 20 | 238 | NOTICE of taking deposition as to Haitian Refugee Center, Inc., on 2/9/82, at 10:00. cs |
| 20 | 239 | MOTION and memo for protective order, by U.S.A. cs |
| 21 | 240 | COPY of letter from Ira J. Kurzban, Esq., to Thomas Moseley, AUSA, re: discovery and depositions. cs |
| 21 | 241 | RE-NOTICE of taking deposition as to Rev Jean JUSTE, on 1/29/82, at 10:00. cs |
| 21 | 242 | NOTICE of additional authorities, by U.S.A. cs |
| 22 | 243 | MOTION and memo for leave to file a memo in excess of 20 pages. cs |
| 22 | 244 | MOTION to intervene as defts, by State of Florida, ex rel. cs |
| 22 | 245 | ORDER (EPS): Pltfs and defts to file a memo in response to mot to intervene within 5 days from date of order. (EOD-1/22/82-CCAP). cs |
| 22 | 246 | NOTICE of filing affidavits, by pltfs of the following: George Cooper; Arthur C. Helton; Rabbi Herbert M. Baumgard; M. Athalie Range; Claudia Slovinsky; Jacques G. |



| DATE | NR | PROCEEDINGS |
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| | | Rapoport; Gisele Birnbaum and Church World Sdrvice, HIAS: Lutheran Immigration and Refugee Service; Migration and Refugee Services, United States Catholic Conference; World Relief, Young Men's Christian Association. cs |
| 22 | 247 | NOTICE to produce persons for trial as noted herein, by pltfs. rw |
| 22 | 248 | MOTION for protective order or clarification, by pltf. rw |
| 23 | 249 | MOTION to compel for sanctions and responses to mot for protective order, by pltfs. rw |
| 24 | 250 | MOTION to compel documentary requests, by pltfs. rw |
| 26 | 251 | NOTICE of hearing special appointment on 2/1/82, at 9:00. cs |
| 27 | 252 | MEMO in opp to mot to intervene as defts of State of Florida, ex rel., Sim Smith and Jim Smith, by pltfs. cs |
| 27 | 253 | REPLY to mot to intervene by State of Florida, by government. cs |
| 28 | 254 | REPORT on data available with respect to parole of undocumented aliens, by defts. cs |
| 28 | 255 | STIPULATION of settlement, by all parties cs |
| 28 | 256 | STIPULATION and ORDER (EPS): mot of the SCLC to intervene is granted and intervention complaint of SCLC is dismissed without prejudice. (EOD-2/1/82-CCAP-M-). cs |

| DATE | NR | PROCEEDINGS |
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| 29 | 257 | ORDER (EPS) Consolidating hearing on mot for a preliminary injunction with trial on the merits on 3/1/82 at 9:30. (EOD-2/1/82-CCAP). cs |
| FEB. 1 | 258 | *ANSWER* and defenses of applicants for intervention. cs |
| Jan. 29 | 259 | REPLY to pltfs' mot to compel for sanctions and response to mot for protective order, by pltfs. cs |
| 29 | 260 | REPLY to pltfs' mot to compel documentary requests, by government. cs |
| 29 | 261 | RESPONSE to pltf's mot for protective order or clarification, by pltf. cs |
| Feb. 3 | 262 | LETTER from Thomas E. Moseley, AUSA, to EPS, re: court's request of two draft order. cs |
| 3 | 263 | NOTICE of submission, by Government. cs |
| 1 | 264 | ORDER (EPS) to show cause why court should not appt expert to prepare a statistical analysis of evidence pertaining to Pltfs' claims of discrimination, returnable on 2/1/82 at 2:00. (EOD-2/5/82-CCAP). |
| 2 | 265 | NOTICE of appearance of Michael J. Rosen, Esq. as trial counsel on behalf of American Civil Liberties Union. |
| 2 | 266 | ORDER (EPS) denying the motion of the State of Florida to intervene. If and when relief Pltfs seek is granted the State may renew its motion. (EOD-2/5/82-CCAP). |
| 5 | 267 | MOTION for clarification, by pltfs. cs |



| DATE | NR | PROCEEDINGS |
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| 5 | 268 | ORDER (EPS) on pending motiong:<br>1. Motion for protective order is denied in part and granted in part.<br>2. Motion to compel testimony of alan Nelson is Granted but motion for sanctions id denied.<br>3. MOTION to compel production is granted as noted in (a) to (p) of order. (EOD-2/9/82-CCAP)! |
| 8 | 269 | NOTICE of filing affidavit of Michael P. Di Raimondo, by defts. |
| 8 | 270 | LETTER to the Court from U.S. Atty re Haitian crewmen. |
| 8 | 271 | NOTICE of filing proposed order re TRO, by U.S. Atty. |
| 9 | 272 | MOTION for partial clarification of court's dicovery order of 2/5/82. by pltf. cs |
| 9 | 273 | NOTICE of additional authorities, by Thomas E. Moseley, AUSA cs |
| 9 | 274 | RESPONSE to motion for clarification, by pltfs. cs |
| 10 | 275 | REQUESTED response to order on discovery mots dated 2/5/82, by government. cs |
| 10 | 276 | MOTION and memo for leave to file additional interrogatories, cs |
| 12 | 277 | COPY of letter from Ira J. Kurzban, Esq. to Thomas Moseley, re: receipt of letter of 2/9/82. cs |
| 12 | 278 | COPY of letter from Ira J. Kurzban, Esq., to Thomas Moseley, re: deposition. cs |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 12 | 279 | NOTICE of taking deposition of Monsignor Bryan Walsh, on 2/16/82, at 11:00. cs |
| 16 | 280 | MOTION for master's and interpreter's fees and expenses, by Joel Hirschhorn. cs |
| 16 | 281 | MASTER'S report and recommendations cs |
| 16 | 282 | NOTICE of taking deposition as to Rudolph W. Giuliani, on 2/23/82, at 10:00. cs |
| 16 | 283 | MOTION and memo to take deposition of Rudolph W. Giuliani, by pltf. cs |
| 16 | 284 | NOTICE of taking deposition as to Haitian Refugee Center, Inc., on 2/21/82, at 10:00. cs |
| 17 | 285 | TRANSCRIPT of hearing on 11/23/81, pages 2 through 67. cs |
| 17 | 286 | RE-NOTICE of taking deposition, as to Haitian Refugee Center, Inc., on 2/23/82, at 10:00. cs |
| 17 | 287 | MOTION for ext of time within which to submit documents in camera, by defts. cs |
| 9 | 288 | ORDER (EPS) denying decertification and granting modification of class and preliminary injunction. (EOD-2/18/82-CCAP). cs |
| 10 | 289 | NOTICE of taking deposition as to the following: (SEE attached list). cs |
| 11 | 290 | RESPONSE to defts' mot and memo for leave to file additional interrogatories, by pltfs. cs |



| DATE | NR | PROCEEDINGS |
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| 11 | 291 | RESPONSE to defts' requested response to discovery, by pltfs. cs |
| 12 | 292 | ORDER (EPS) setting pretrial conference, on 2/26/82, at 3:30. (EOD-2/18/82-CCAP). cs |
| 12 | 293 | SECOND ORDER (EPS) on pending discovery motions. (See order for details.). EOD-2/18/82-CCAP). cs |
| 16 | 294 | SECOND set of interrogatories and requests to produce documents, by defts. cs |
| 17 | 295 | MOTION for ext of time within which to submit documents in camera, by deft. cs |
| 19 | 296 | COPY of letter from Joel Hirschhorn, Esq., to Vera A. Weisz, Esq., re: enclosure of copy of critificate of Service. cs |
| 19 | 297 | TRANSCRIPT of hearing on 11/9/81, at 3:00, pages 2 through 146. cs |
| 19 | 298 | MEMO in opp to pltf's mot to take depo of Associate Attorney General of U.S., by Government. cs |
| 18 | 299 | ORDER (EPS): Court will proceed on basis of pleadings no before it and vacates order directing pltfs to file an amended complaint. (EOD-2/23/82-CCAP). cs |
| 22 | 300 | MOTION to postpone trial until completion of discovery, by pltfs. and memo in supp of mot. cs |
| 22 | 301 | MEMO in supp of mot for leave to take deposition of Rudolph Guilaiani, by pltfs. cs |

| DATE | NR | PROCEEDINGS |
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| 22 ** | 302 | ORDER (EPS) granting mot for ext of time up to and including 2/22/82. (EOD-2/23/82-CCAP). cs |
| 23 | 303 | DEPOSITION of Monsignor Bryan Walsh, on 2/15/82, at 3:05. cs |
| 23 | 304 | DEPOSITION of Gerard Jean Juste, on 2/9/82, at 3:40. cs |
| 23 | 305 | MEMO in opp to pltf's mot to postpone trial, by government. cs |
| 23 | 306 | SUPPLEMENTAL memo with respect to pltf's mot for leave to take depo of Rudolph Guiliani, by pltfs. cs |
| 25 | 307 | TRANSCRIPT of hearing on 2/1/82, pages 2 through 111. cs |
| 25 | 308 | TRANSCRIPT of hearing on 2/9/82, pages 2 through 19. cs |
| 25 | 309 | TRANSCRIPT of hearing on 1/11/82, pages 2 through 125. cs |
| 23 | 310 | ORDER (EPS) awarding and assessing master's and interpreter's fees and expenses. Master is awarded the sum of $7,556.25 for fees, and additional sum of $3,576.67 as expenses. Interpreter is awarded the sum of $2,450.00 as fees, and additional sum of $150.00 for expenses. Defts pay to Joel Hirschhorn, Esq., the sum of $7,556.25 by way of Master's fees and the sum of $3,576.67 for reimbursement of out-of-pocket expenses, for a total of $11,132.92. Deft pay to Vivian N. Boulous, translating services the sum of $2,450.00 for interpreter's fees and |



| DATE | NR | PROCEEDINGS |
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| | | $150.00 for reimbursement of out-of-pocket expenses, for a total of $2,600.00 (EOD-2/25/82-CCAP). cs |
| 26 | 311 | TRANSCRIPT of cont'd hearing on 2/2/82 (Pages 1-100). rw |
| 26 | 312 | MOTION for leave to file reply w/memo, by pltf. br |
| 24 | 313 | MEMO OPINION AND ORDER (EPS) Grantin deft. motion to dis in part. (See order for details) EOD-3/1/82-CCAP) br |
| 26 | 314 | SUPPLEMENTAL MEMO in support of motion to leave to take depo of Rudolph Guiliani, by pltf. br |
| 26 | 315 | MOTION to strike trial w/memo, by pltf. br |
| 26 | 317 | MOTION for permission to file Amicus Curiae in support of motion, American Immigration Lawyers Association. br |
| 26 | 318 | MEMO in support of motion, by American Lawyers Association Amicus Curiae. br |
| 22 | 320 | MOTION and memo for leave to file a reply to defts' memo in opp to pltfs' mot to take deposition of the Associate Attorney General of the U.S., by pltfs. cs |
| Mar. 1 | 321 | DEPOSITION of Hugh J. Brien, on 2/19/82, at 10:10. cs |
| 1 | 322 | DEPOSITION of James A. Puleo, on 2/19/82, at 2:17. cs |
| 1 | 323 | DEPOSITION of Alan C. Nelson, on 2/18/82, at 10:11. cs |

| DATE | NR | PROCEEDINGS |
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| 1 | 324 | OATH to volunteers (EPS-3/1/82), of the following people: cs<br>Yolanda Mellon — Wendy Ehrenkranz<br>Karen Flax — Frank Citera<br>Steve Davis — Susan Aprill<br>Carol Schoffel — Barry Silver<br>Carol Norris — Francis Carroll<br>Alan Petrine — Joe Chambrot<br>Bradshaw Lotspeich — Stacie Cohen<br>Daniel E. Sommers — Tony E. Marin cs |
| 1 | 325 | MEMO in supp of mot for leave to retake depositions of Ferro, Nelson and Brien in District for Attorney's fees, costs and other relief, by pltfs. cs |
| 1 | 326 | MOTION for leave to retake deposition of Ferro, Nelson and Brien in this District and for attorney's feex, costs and other relief, by pltfs. cs |
| 1 | 327 | MOTION and memo for protective order, by pltfs. cs |
| 1 | 328 | COPY of letter from Robert L. Bombaugh, attorney Commercial Litigation Branch Civil Division, to EPS, re: documents. cs |
| 1 | 329 | SUPPLEMENTAL lists of witnesses for pltfs. cs |
| 1 | 330 | NOTICE of taking depositions of the following:<br>Allen Nelson on 3/4/82, at 9:00.<br>Hugh Brien on 3/4/82, at 2:00.<br>Rudolph Guiliani on 3/5/82, at 9:00.<br>Vern Jervis on 3/6/82, at 10:00.<br>Andrew Carmichael on 3/6/82, at 2:00. |



| DATE | NR | PROCEEDINGS |
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| | | David Hiller on 3/8/82, at 9:00.<br>Paul Schmidt on 3/8/82, at 1:00.cs |
| 1 ** | 331 | NOTICE of taking deposition of District Directof of Miami Joe Howerton, on 3/10/82, at 10:00. cs |
| 3 | 332 | ORDER (EPS-3/2/82) sealing documents submitted for in camera inspection by court. (EOD-3/3/82-CCAP). cs |
| 3 | 333 | NOTICE of filing volumes of documents submitted, by Government. cs |
| | 334 | NOTICE of filing documents that were ordered produced out of 3 vol of in camera material submitted, by defts. cs |
| 3 | 335 | NOTICE of filing one volume of documents submitted by defts for in camera inspection. cs |
| ** 2 | 336 | PRETRIAL stipulation, by both parties. cs |
| 2 | 337 | PROPOSED pretrial stipulation, by defts. cs |
| 2 | 338 | RESPONSE to court order on taking deposition of David Hiller, Paul Schmidt, Andrew Carmichael, and Vern Jervis, by pltfs. cs |
| 3 | 339 | REPLY to pltfs' response to additional depositions, by Government. cs |
| 3 | 340 | ORDER (EPS 3/2/82) substituting party deft. Alan Nelson be substituted as named deft in action and prior deft Doris Meissner be dropped as party to cause. (EOD-3/4/82-CCAP). cs |

| DATE | NR | PROCEEDINGS |
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| 4 | 341 | RESPONSE to mot and memo to strike trial attorneys from defts' trial witness list, by pltf. cs |
| 4 | 342 | RESPONSE to pltf's notice to produce witnesses, by government. cs |
| 4 | 343 | MOTION and memo to modify order on pending mots, by government. cs |
| 4 | 344 | MOTION and memo for protective order with respect to the time for deposition of Leonard Rowland. cs |
| 4 | 345 | RESPONSE to pltf's mot and memo for protective order and cross mot for protective order, by defts. cs |
| 4 | 346 | REPLY to pltfs' response to additional depositions, by deft. cs |
| 4 | 347 | NOTICE of filing, by Thomas E. Moseley. cs |
| 4 | 348 | EXAMINATION before trial of James W. Grable on 2/17/82, at 12:30. cs |
| 4 | 349 | EXAMINATION before trial of Benedict Ferro on 2/17/82, at 2:30. cs |
| 3 | 350 | ORDER (EPS-3/3/82) granting in part and denying in part pltf's mot to take depositions of Mr. Hiller and Mr. Schmidt is granted, the mot to take depositions of Mr. Carmichale and Mr. Jervis is denied and mot to retake Mr. Brian's deposition is granted. (EOD-3/9/82-CCAP). cs |
| 3 | 351 | ORDER (EPS-3/3/82) setting hearing for 3/10/82, at 1:30. EOD-3/9/82-CCAP). cs |
| 3 | 352 | ORDER (EPS-3/3/82) on pending motions. Mot for permission to file |



| DATE | NR | PROCEEDINGS |
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| | | memo in supp of pltfs' mot for a preliminary injunction is denied. Pltfs' mot to postpone trial until completion of discovery is granted but request to proceed with hearing on mot for a preliminary injunction is denied. Trial will start on 3/15/82 at 9:30. and pretrial confernece to be held on 3/12/82 at 9:30. Mot to retake depo of Mr. Nelson is granted. Mot to retake Mr. Ferro's depo is denied. Mot to Take Mr. Guiliani is granted. Pltfs mot for leave to file reply to defts memo in opp to pltfs' mot for a preliminary injunction is granted. Memo filed by defts in response to plft's mot for protective order within 5 days from date of order. (EOD-3/9/82-CCAP). cs |
| Mar | 4 | 353 ORDER (EPS-3/4/82) enjoining the transfer of class members from their present locations. (EOD-3/9/82-CCAP). cs |
| | 5 | 354 ORDER (EPS 3/5/82) granting deft's mot for protective order with regard to deposition of Leonard Rowland and Granting mot to modify the pretrial. (EOD-3/9/82-CCAP). cs |
| | 8 | 355 FIRST supplemental witness list, by government. cs |
| | 8 | 356 DEPOSITION designations, by governments. cs |
| | 9 | 357 NOTICE of additional authorities, by government. cs |

| DATE | NR | PROCEEDINGS |
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| 10 | 358 | OBJECTIONS and cross designations, by governments. cs |
| 10 | 359 | NOTICE of filing, by pltfs. cs |
| 9 | 360 | ORDER (EPS-3/9/82) denying mot to strike without prejudice. (EOD-3/11/82-CCAP). cs |
| 9 | 361 | ORDER (EPS-3/9/82) on cross motions for protective orders. Both parties refrain from using method of discovery not set forth and no discovery to conducted in violation of any of the provisions of Red rules. There shall be no interviews unless opposing counsel is notified as required and all rule's other requirments are complied with. Violations of this order will result in the imposition ~~of sa~~ctions. (EOD-3/11/82-CCAP). cs |
| 9 | 362 | ORDER (EPS-3/9/82): Affirmative defense numbers 2, 3, 7, and nine are moot in light of court's order of dismissal dated 2/24/82. Said affirmative defenses are hereby dismissed. (EOD-3/11/82-CCAP). cs |
| 11 | 363 | RESPONSE to deft's refusal to produce witnesses, by pltfs. cs |
| 15 | 364 | DEPOSITION of Joe D. Howerton, taken 3/10/82. rw |
| 15 | 365 | DEPOSITION of Leonard E. Rowland, taken 3/8/82. rw |
| 15 | 366 | PROPOSED Stip of Guidelines for access to detention facilities, by Pltfs. rw |



| DATE | NR | PROCEEDINGS |
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| 15 | 367 | MOTION for leave to transfer Class Members, by defts. rw |
| 15 | 368 | CROSS-NOTICE of add'l authority, by pltfs. rw |
| 16 | 369 | DEPOSITIONS OF: (Filed under Seal) Hugh Brien, taken 3/3/82 Paul W. Schmidt, taken 3/3/82 Alan C. Nelson, taken 3/4/82 Rudolph W. Giuliani, taken 3/5/83 David Dean Miller, taken 3/5/82 rw |
| 16 | 370 | STIPULATON regarding intervention of Dade County Bar Association Haitian Refugee Volunteer lawyer Task Force, by INS. cs |
| 16 | 371 | ORDER (EPS-3/16/82) approving stip regarding intervention of Dade County Bar Association Haitian Refugee Volunteer Layer Task Force. (EOD-3/18/82-CCAP). cs |
| 18 | 372 | MOTION for leave to transfer class members, by U.S.A. cs |
| 19 | 373 | JOEL HIRSCHORN, as special master, is precluded from testifying at trial. cs |
| 19 | 374 | TRIAL memo concerning admissibility of testimony at prior proceeding, by pltfs. cs |
| 22 | 375 | DESIGNATION of interrogatories and request for admissions, by pltfs. cs |
| 22 | 376 | MEMO in response to deft's claim of privilege to deny admission of memo into evidence, by pltfs. cs |
| 22 | 377 | DESIGNATION of depositions, by pltfs. cs |

| DATE | NR | PROCEEDINGS |
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| 12 | 378 | PRETRIAL memo of Amicus Curiae, State of Florida, by attorney general. cs |
| 26 | 379 | MEMO in opp to deft's mot for leave to transfer class member, by pltfs. cs |
| 26 | 380 | MEMO in supp of mot for leave to transfer class members, by defts. cs |
| 29 | 381 | OBJECTIONS and cross designations, by governments. cs |
| 29 | 382 | MOTION to dism, by government. cs |
| 29 | 383 | SUPPLEMENTAL designation of depositions, by pltfs. cs |
| 29 | 384 | TRIAL memo concerning judicial notice, by defts. cs |
| 29 | 385 | ORDER (EPS-3/26/82) granting in part and deying in part defts mot for permission to transfer class members. (EOD-3/30/82-CCAP). cs |
| 29 | 386 | MOTION to compel responses to interrogatories and request for production of documents, by defts. cs |
| Apr. 2 | 387 | NOTICE of filing, by pltfs. cs |
| 5 | 388 | AMICUS' memo in opp to pltfs' mot for preliminary injuction, by pltfs. |
| 5 | 389 | MOTION for rehearing and memo in supp of mot. by pltfs. cs |
| 6 | 390 | MEMO by Judge Spellman requesting the resealing of box of documents. cs |
| 6 | 391 | MOTION to rpoduce statistical data and memo in supp. by pltfs. cs |



| DATE | NR | PROCEEDINGS |
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| 7 | 392 | ORDER (EPS-4/6/82) dening plfts request for preliminary injunction and renewed mot for preliminary injunction will be consolidated with the trial on the merits, and ct will reserve ruling on the propriety of relief sought therein until trisl is concluded. (EOD-4/8/82-CCAP). cs |
| 12 | 393 | MOTION and memo to vacate order granting permission to transfer class members, by defts. cs |
| 13 | 394 | REPLY to mot to produce statistica data, by pltfs. cs |
| 13 | 395 | CROSS design ations of depositions, by defts. cs |
| 16 | 396 | PRETRIAL conference transcript taken on 3/12/82, pages 2 through 97. cs |
| 16 | 397 | TRANSCRIPT of hearong on mot to transfer, taken 3/24/82, pages 2 through 84, cs |
| 16 | 398 | TRANSCRIPT of final hearing on 3/15/82, pages 2 through 288, vol. I. cs |
| 16 | 399 | TRANSCRIPT of continued final hearong on 3/16/82, pages 289 through 487, vol II. cs |
| 16 | 400 | TRANSCRIPT of final hearong on 3/17/82, pages 488 through 675, vol. III. cs |

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| 16 | 401 | TRANSCRIPT of continued final hearing on 3/18/82, pages 676 through 875, vol IV. cs |
| 16 | 402 | TRANSCRIPT of continued final hearing on 3/19/82, pages 876 through 1083, vol V. cs |
| 16 | 403 | TRANSCRIPT of continued final hearing on 3/22/82, pages 1084 through 1328, vol VI. cs |
| 16 | 404 | TRANSCRIPT of continued final hearing on 3/23/82, pages 1329 through 1504, vol VII. cs |
| 16 | 405 | TRANSCRIPT of continued final hearing on 3/24/82, pages 1505 through 1665, vol VIII. cs |
| 16 | 406 | TRANSCRIPT of continued final hearing on 3/24/82, pages 1666 through 1826, vol IX. cs |
| 16 | 407 | TRANSCRIPT of continued final hearong on 3/30/82, pages 1827 through 2045, vol X. cs |
| 16 | 408 | TRANSCRIPT of continued final hearing on e/31/82, pages 2046 through 2215, vol XI. cs |
| 16 | 409 | TRANSCRIPT of continued final hearing on 4/1/82, pages 2216 through 2426, vol XII. cs |
| 16 | 410 | TRANSCRIPT of continued final hearing on 4/2/82, pages 2427 through 2515, vol XIII. cs |



| DATE | NR | PROCEEDINGS |
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| 16 | 411 | MOTION and memo to preclude rebuttal witnesses and documents, by pltf. cs |
| 16 | 412 | SUBMISSION on Haitian Refugee Center v. Civiletti as rebuttal, by pltfs. cs |
| 19 | 413 | ORDER (EPS-4/19/82) vacating order, granting defts' mot for leave to transfer class members. |
| 21 | 414 | COPY of letter from Ira J. Kruzban, esq., to Thomas Moseley, U.S. Attorney, re: filing of notice of taking deposition. cs |
| 22 | 415 | MOTION for submission of decision, by pltfs. cs |
| 26 | 416 | RESPONSE to court order requesting the establishment of a Nationwide Haitian Pro Bono representation program, by defts. cs |
| 26 | 417 | OBJECTIONS and cross designations, by pltfs. cs |
| 23 | 418 | NOTICE of rebuttal witnesses and documents, in camera, by pltfs. cs |
| 29 | 419 | TRANSCRIPT of continued final hearing on 4/19/82, pages 2516 through 2766. cs |
| 29 | 420 | TRANSCRIPT of continued final hearing on 4/20/82, pages 2767 through 2857. vol XV. cs |
| 29 | 421 | TRANSCRIPT of continued final hearing on 4/26/82, pages 2858 through 3069, vol XVI. cs |

| DATE | NR | PROCEEDINGS |
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| 29 | 422 | TRANSCRIPT of continued final hearing on 4/27/82, pages 3070 through 3317, vol. XVII. cs |
| 21 | 423 | NOTICE of taking deposition on 4/23/82, at 3:00, of person or persons who created and have entered data into INS Krome Computer, and on 4/23/82, at 5:00, of person or persons who were responsible for creating and keeping numerical records. cs |
| May 5 | 424 | ORDER (EPS-4/29/82) sealing document. (EOD-5/3/82-CCAP). (Docket # 418 sealed in vault of office of clk. cs |
| 3 | 425 | OBJECTIONS to deft's cross designations, by pltfs. cs |
| 4 | 426 | ORDER (EPS-4/29/82): Exhibits offered into evidence on which the ct reserved ruling: Pltfs 114, 115, 117, 132, 133, 182, 183, 186, 187, 190, 191, 192, 195 and 196. (EOD-5/5/82-CCAP). cs |
| *Aor 30 | 427 | ORDER (EPS-4/29/82) granting pltfs 24 hours to designate files they wish to copy. (EOD-5/5/82-CCAP). cs |
| 30 | 428 | ORDER (EPS-4/30/82) admitting plts exhibits 10 and 11 into evidence. (EOD-5/5/82-CCAP). cs |
| 30 | 429 | ORDER (EPS-4/29/82) clarifying court's order of 4/19/82. (EOD-5/5/82-CCAP). cs |
| May 4 | 430 | Motion for continuance, by pltfs. cs |



| DATE | NR | PROCEEDINGS |
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| 6 | 431 | PROPOSED findings of fact & conclusions, by Govn't. cs |
| 6 | 432 | RESPONSE on cross designations, by govn't. cs |
| 6 | 433 | MOTION & memo for leave to file oversize brief, by govn't. cs |
| 6 | 434 | NOTICE of filing, by govn't. cs |
| 7 | 435 | NOTICE of filing, by pltf. cs |
| 6 | 436 | POST trial brief & proposed findings of fact & conclusions by pltf. cs |
| 7 | 437 | MOTION for a 24 hour ext. of time by pltf. cs |
| 10 | 438 | POST trial memo of AMIGUS CURIAE, State of Florida. cs |
| 10 | 439 | NOTICE of submissions, by govn't. cs |
| 11 | 440 | NOTICE of filing corrected copies of pltfs' post trial brief & proposed findings of facts & conclusions, (pltf) cs |
| 11 | 441 | REPLY brief, by pltfs. cs |
| 12 | 442 | MOTION & memo for ext. of time until 5/14/82, to file report with respect to reunification, by govn't. cs |
| 17 | 443 | FINDINGS of facts & conclusion w/ respect to discrimination by pltf. br |
| 21 | 444 | RESPONSE of Amicus Ciroae to pltfs' mot. to strike. rw |
| 20 | 445 | PRELIMINARY status report, by govn't. rw |
| 26 | 446 | NOTICE of filing papers attached (Opinion of Appeals court) rw |
| June 1 | 447 | MEMO & memo for appt. of special master, by defts. rw |

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| 8 | 448 | RESPONSE to Court Order requestin report on reunification of families, by defts. fw |
| 14 | 449 | NOTICE of filing the final report of the Grand Jury, filed 5/11/82 by pltfs. rw |
| 14 | 450 | MOTION for ext. of time to respond to request for appt. of special master by pltfs. rw |
| 14 | 451 | REPLY to pltfs' mot. for ext. of time, by pltfs. rw |
| 18 | 452 | MEMO opinion (EPS-6/18/82.) lw |
| 23 | 453 | PLAN for release by pltf. lw |
| 22 | 454 | HEARIN memo, by deft. lw |
| 25 | 455 | MEMO in supp. of emergency mots. to intervene, to vacate gag order & to vacte order limition public & press access to negotiations, by Post Newsweek Stations. |
| 25 | 456 | REQUEST for expedited hearing, by Miami Daily News. lw |
| 25 | 457 | REQUEST for emergency hearing, by Post-Newsweek Stations, Fla. Inc. lw |
| 25 | 458 | MEMO in supp. of mot. to intervene & to vac various orders impacting first amendment rights, by Miami Daily News. lw |
| 25 | 459 | MOTION to intervene & to vac various orders, etc by Miami Daily News. lw |
| 25 | 460 | EMERGENCY mots. to intervene, to vac gag order, to vac order denying access to degotiations of parties, by Post-Newsweek Stations. lw |



| DATE | NR | PROCEEDINGS |
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| 25 | 461 | ORDER (EPS 6/25/82)<br>1. granting mots. of Miami Daily News, Inc, Post-Newsweek<br>2. denying their mot. to vacate Gag order.<br>3. denying their mot. to vacate order limiting public & press access to negotiations. |
| June 25 | 461 | ORDER (EPS 6/25/82) continued from previous entru.<br>4. Ct's order restraining parties from commenting re: final judgment in this cause & any matters re: thereto until exec of said document in open court by EPS 6/29/82 at 10:00, cont in full force & effect.<br>5. denying mot. to vacate order limiting public & press access to negotiations as it has been superceded by gag order.<br>6. dism intervening parties based on stated findings & conclusions. EOD 6/30/82 CCAP-M) lw |
| 29 | 462 | MOTION to intervene, by Louisa Edmond, Louisamund Edmond, Frank Verne Lomaine Fidogene, Odetta Baptist, Marie claude Loguerre & Germaine Lumaine. (att proposed petn for writ of haveas corpus) lw |
| 29 | 463 | MEMO in supp of mot. to intervene, by above-named proposed intervenors. lw |

| DATE | NR | PROCEEDINGS |
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| 22 | 464 | LETTER to EPS, 6/25/82 from richard J. Ovelmen, re: req. that said letter be treated as a formal emergency mot. for leave to intervene & to app before Ct. on behalf of the Miami Hearld Publishing Co. |
| 29 | 465 | MOTION & memo for stay pending appeal, by defts. lw |
| 29 | 466 | MOTION & memo to modigy final judgment & alt. for partial stay pending appeal, by defts. lw |
| 30 | 467 | *NOTICE OF CROSS-APPEAL* filed by pltfs. from the order grantin deft. mot to dismiss in part entered 2/24/82 & from the order entered 6/18/82 styled memo opinion & from the order rntered 6/29/82 styled final judgment & from the order entered 6/29/82 denying pltfs. mot for reconsideration. (cc USCA & all counsel of record) rd |
| 29 | 468 | NOTICE of intention to proceed with rule making & renewed request for stay. rd |
| 29 | 469 | FINAL JUDGMENT (EPS 6/29/82) referring to Ct's 6/18/82 opinion & subsequent hearing on 6/23/82 to det effect of Ct's ruling. New detention policy is null § void & policy re parole, that was used prior to 5/20/81 is in full force & effect. St. believes that remedy that best serves int of all parties to litigarion is an in- |



| DATE | NR | PROCEEDINGS |
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| | | terim palan for release of pltfs on parole subj to conditions set forth pending a determinstion of their claims for admission.<br>ORDERED:<br>1. Final judgment entered in favor of defts as to Count VII of Complt.<br>2. Final judgment entered in favor of pltfs as to Count II of Complt.<br>3. Defts are enjoined from enforcing their policy of detaining excludable aliens unless they est to INS' sat a claim for admission. Inj shall not be construed to preclude detention of excludable aliens deemed a security rist or likely to abscond.<br>4. Defts. are enjoined from cont to detain pltfs herein & are ordered to release said individuals.<br>5. Implementation of #4 is to be commenced forthwith in accordance w/terms & conditions set forth in this judgment. (see court file for detailed info)<br>6. Granting mot of Haitian Refugee Center, Inc. to enlarge class to include all Haitians in detention for whom a G-28 has been filed on behalf of said pltfs. Said indiv are included w/in said class & are bound by full effects of Ct's opin- |

| DATE | NR | PROCEEDINGS |
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| | | ion of 6/18/82 & provisions of final judgment.<br>7. Ct vacates any interlocutory orders entered by Ct or by predecessor Judge & does relinquish jurisdiction over the members of said class to ext that same is not hereafter retained by Ct.<br>8. Ct retains jurisdiction over parties & subj matter on<br>a) defts' mot to vac Ct' order enjoining exclusionary hearings relative to members of class who are not rep by either private or pro bono counsel<br>b) Ct's order of 2/8/82 as the same pertains to the pro bono program of the Dade County Bar Assn<br>c) Pltf's mot ordering granting of relief to indiv members of class who have escaped from detention to be entitled to benefits of Ct's opinion of 6/18/82 & Ct's final judgment<br>d) enforcement of the terms & conditions of this final judgment<br>e) pltf's mot for award of attys' fees & all costs w/understanding that retention of jurisdiction as to that issue is not a det of merits of entitlement of |



| DATE | NR | PROCEEDINGS |
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| | | pltfs to either attys' fees or costs.<br>(EOD 7/2/82-CCAP-M) (The class certified by the Court is indicated on page 2 of the docket sheet) lw |
| 29 | 470 | ORDER (EPS-6/29/82) denying pltfs' mot for reconsideration of Ct's order of dism. Granting pltfs' mot to amend the class; class is modified to include all indiv who would be w/in the class as defined by for the fact that they are rep by counsel. Pltfs are directed to provide notice of modification to those indiv not previously members of this class. Said indiv have 20 days to notify Ct of their intention to opt out of this action or they will be deemed members of class herein & subj to all requirements. Class mod expressly exempts from its purview those indiv subj of Judge Robert L. Carter's Order & the 2nd Circuit's recent opinion which Ct understands to be 53 indiv. This order is part of Ct's final judgment, which is now final as to all counts. Class as modified shall be entitled to all of relief afforded by final judgment. (EOD 7/2/82-CCAP-M) lw |
| 30 | 471 | ORDER (EPS-6/30/82) denying defts' mot for a stay of Ct's entire final judgment. Defts' mot for a partial stay, w/regard to prospective effects |

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| | | of final judgment, will be taken under advisement for a period of 10 days. (EOD 7/2/82-CCAP) lw |
| 30 | 472 | ORDER (EPS-6/30/82) denying defts' mot for modification of the class. Denying defts' mot to amend final judgment to permit prospective application of detention policy for 10 days. Ordered nunc pro tunc to 11:00 A.M., 6/30/82. (EOD 7/2/82-CCAP) lw |
| 30 | 473 | *NOTICE of appeal* filed by defts. from the final judgment entered 6/29/82. (cc USCA & all attys. of record) this appeal was filed in open court. . . rd |
| 30 | 474 | AMICUS memo supporting mot. to modify final judgment or for partial stay. (Atty. General, cc USCA) rd |
| July 2 | 475 | ORDER (EPS) GRANTING dmot. for partial stay; on 6/30/82, the Court indicated that under no circumstances would it stay the release of the pltfs now in detention but, upon a proper showing of an intent to engage in rulemaking & a likelihood of irreprabale harm during the interim a stay would be considered w/ regard to aliens who arrive in the future. On 7/1/82 defts filed a not. of intent tp proceed w/rulemaking, on 7/2/82 St. of Fl filed their renewed mot to intervene w/mot for part. stay, consistent w/information |



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| | | obtained your affiant fears a renewed in flux of Hatian & other aliens if the cts judgment (6/29/82) is not stayed. ORDERED that the portion of cts final judgment 6/29/82 is stayed for a period of 30 days, defts shall publish not of their intent to engage in rulemaking w/regard to detention no later than 30 days after this order, failure to do so will result in the lifting of this stay. EOD-7/7/82 7/2/82-EPS. rd |
| 2 | 476 | RESPONSE to mot to intervene by Louisa Edmond, et al. (govn't) rd |
| 7 | 477 | MOTION to enforce final judgment, 1. following the issuance of final judgment (6/29/82) pltfs MARCELIN & MEME filed petitions of writ of habeas corpus seeking release from Krome Det. Center based on final Judgment which enjoined from the cont. to detain pltfs. 2. said petition fell into division of Judge Aronovitz 7/2/82. 3. SMA on said pet. in open ct. ordered both pltfs be severed & habeas corpus be transferred to Judge Spellman for consolidation w/81/1260 for cinsideration by Judge Spellman. (pltfs.) |
| 8 | 478 | ORDER (EPS-7/8/82)-1) Atty Rubin shall w/i 5 days from ent. of this order comply with Local Rule 10 by filing memo in support of said mot. & serv. copy of said mot. to enf. final |

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| | | judgment w/memo, on counsel for Pltfs & State of Fl, 2) Atty Rubin (in addition) shall w/i 5 days file signed statement exec. by Sylvain Marcelin & Fignole Meme indicating their individual intent as to whether or not they desire to reamin members of the class heretofore certified by this Court or, in alternative to opt out of said class therby not being bound by Court's June 18th, 1982 opinion & Final Judgment—and in event they so opt, Court, when satisfied that decision is a free & voluntary one, will enter order removing them from the class & all. them to proceed as they deem advisable in a separate suit, 3) Pltf's counsel w/i 5 days from service of said mot. & memo wil file w/Court a response indicating whether named individuals are in fact members of certified class of pltfs herein & whether or not they intend, in the future, to represent their interests w/regard to this matter, 4) Mot. heretofore filed to enforce final judgment be & the same is hereby held in abeyance pend. filing of above & foregoing pleadings. (EOD-7/12/82) ai |
| 9 | 479 | *NOTICE OF APPEAL* by Intervenor Miami Daily News from 1) Oral Order ent. 6/24/82 directing trial |



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| | | participants, inc. esp. parties & their respective counsel, to refrain from discussing with public or press contents of proposed order which court circulated to parties & their attorneys, 2) Oral Order ent. 6/24/82 sealing file on captioned matter so that neither public nor press would have direct acess to Court's proposed Order, & 3) Court's written Order of 6/25/82—"Order Gtf Pltfs' Mot. to Intervene, Denying Pltf's Mot. to Vacate Gag Order & denying Pltfs' Mot. to Vacate Order Limiting public & press Access to Negotiations". (Copies to USCA, Ct Rept, Joseph P. Averill, Esq., Ira Kurzban, Esq., Bruce Winick, Esq., Michael J. Rosen, Esq., Robert Bombaugh, Esq-Dept of Justice, Jay Brant, Esq-Asst U.S. Atty, Jim Peters, Esq-Asst Atty General) ai |
| 9 | 480 | RESPONSE to Motion to Enforce Final Judgment. (Govt) ai |
| 12 | 481 | CLASSMEMBERS' letters pursuant to court's request. (letters submitted (15) from attys, throughout US, representing various incarcerated Haitian Refugees) rd |
| 16 | 482 | TRANSCRIPT of hearing before Judge Spellman, held 2/26/82 pgs. 1-93. rd |

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| 16 | 483 | TRANSCRIPT of pre-trial confrence held 3/1/82, before Judge Spellman, pgs. 1-137. rd |
| 16 | 484 | TRANSCRIPT of closing argument of pltfs. before Judge Spellman held 5/14/82, pgs. 1-210. rd |
| 16 | 485 | TRANSCRIPT of contnued closing arguments before Judge Spellman held 5/18/82, pgs. 1-160. rd |
| 16 | 486 | TRANSCRIPT of hearing held 6/28/82, pgs. 1-196, before Judge Spellman. rd |
| 16 | 487 | TRANSCRIPT of hearing held 6/29/82, before Judge Spellman pgs. 1-128. rd |
| 16 | 488 | TRANSCRIPT of hearing held 6/30/82, before Judge Spellman pgs. 1-71. rd |
| 16 | 489 | TRANSCRIPT of hearing before Judge Spellman, held 7/2/82 pgs. 1-103. rd |
| 19 | – | RECORD on appeal trans. to USCA, consisting of 17-vol. plead, 45-vol. trans., 3-acc. fold. depos., exhibits retained in Judges office. rd |
| 14 | 490 | AMENDED certificate of service (Miami Daily News) rd |
| 13 | 491 | MEMO of law in support of mot. to enforce judgment. rd |
| 21 | – | FIRST SUPP. record on appeal trans. to USCA, consisting of 5-boxes (4-boxes of exhibits & 1-box depsos) The balance of the exhibits are in EPS-office. rd |



| DATE | NR | PROCEEDINGS |
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| 16 | 492 | NOTICE of Publication of Rule Making on 7/9/82, at Vo. 47, No. 132 of the Federal Register. (GOVT) ai |
| 20 | 493 | ORDER of USCA-Denying Govt's Motion for Partial Stay of judgment ent. 6/29/82. (7/13/82-CA) (82-5772) (EOD-7/22/82-M) ai |
| 20 | 494 | ORDER of USCA-Denying affidavit & statement of American Council of Voluntary Agencies for Foreign Service, Inc., considered tog. as motion for leave to file a brief as amicus curiae. (7/13/82-CA) (EOD-7/22/82-M) ai |
| 22 | 495 | TRANSCRIPT of Hearing held on 6/24/82, pages 1-24. (9:00 A.M.) ai |
| 22 | 496 | TRANSCRIPT of Hearing held on 6/24/82 at 4:45 P.M., pages 1-10. ai |
| 22 | – | SECOND SUPPLEMENTAL Record on Appeal transmitted to USCA – 2 vols transcript. ai |
| 23 | 497 | *NOTICE OF APPEAL* filed by intervenor the Miami Hearld, SEE DOCKET NO. 479 (IDENTICAL PLEADING) (CC I. KURZBAN, BRUCE WINICK, MICHAEL ROSEN, ROBERT BOMBAUGH JAY BRANT, JIM PETERS, VERA WEISZ, STEEL, HECTOR & DAVIS & JOSEPH AVERILL) rd |
| 19 | 498 | ORDER (EPS 7/16/82) The following Haitian asylum applicants in detention by INS in New Orleans are |

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| | | LOUISA EDMOND, LOUISAUAD EDMOND, FRANK VERNE, LOMIANE FIDOGENE, ODETTE BAPTIST, MARIE LAQUERRE and GERMAINE LUMAINE are included in class of pltfs. in this lawsuit & bound by prior orders & final judgment in this case. That if any litigation has been brought on behalf of these named Haitians seeking release, that action shall be dismissed by counsel for these named Haitians w/i 10 days of date of the order. (EOD 7/27/82) gc |
| 29 | 499 | MEMO of law in support of pltfs' request for costs for expert fees & attys fees. (pltfs) rd |
| 29 | 500 | LETTER w/attached corrected copy of above entry. (doc. no. 499) rd |
| 29 | 501 | MOTION for attys fees & costs. (pltf) rd |
| Aug. 6 | 502 | *COPY* of "comments on the interim rule concerning detention & parole of aliens. (Ira Kurzban) rd |
| 12 | 503 | MOTION for Enlargement of Time & Memo of Law. (Defts) ai |
| 06 | 503a | Comments on the interim Rule concerning Detention & Parole of Aliens dll |
| 16 | 504 | NOTICE of taking depositions., SEE ATTACHED SCHEDULE A. rd |
| 17 | 505 | MEMO in opposition to motion for enlargement of time to respond to request for fees and costs. (defts) rd |



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| 17 | 506 | ORDER (EPS) the folowing organizations be & hereby are appointed as independent third parties to whom reports are made; Barry University, Miami Shores, Florida Graduate School of Social Services, NY, NY EOD/ 8/20/82 8/12/82-EPS. rd |
| 20 | 507 | REQUEST for expedited consideration of motion for protective order & to stay discovery. (defts) rd |
| 20 | 508 | MOTION for protective order (defts) rd |
| 23 | 509 | MEMO in Response to Defts' Request for a Protective Order & Request for Hearing. (Pltfs) ai |
| 24 | 510 | ORDER (EPS-8/24/82) granting defts' motion for protective order, hearing set for 8/30/82 at 9:00 A.M. EOD 9/1/82. |
| 27 | 511 | STATUS report. (Federal defts) |
| 31 | 512 | DEPOSITION of JERRY WYNNE, taken 8/24/82, pgs. 1-33 plus miscel. plead. |
| 27 | 513 | ORDER (8/27/82-EPS) hearing set for 8/30/82 has been re-set for 9/3/82 at 9:00 am. EOD 9/3/82. rd |
| 30 | 514 | ORDER (EPS-8/30/82) granting deft's mot for an ext of time to respond to pltfs' mot. to tax costs & for award of attys. fees. EOD/M 9/3/82. rd |
| 31 | 515 | MOTION for a hearing or alternatively to appoint a Special Master. (pltfs) rd |
| Sept. 7 | 516 | NOTICE of Filing of affidavit of Bruce J. Winick, Esq., & Irwin P. Stotzky, Esq. gc |

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| 3 | 517 | SUPPLEMENTAL petition for costs & fees by pltfs. gc |
| 13 | 518 | LETTER from Arthur C. Helton to Judge Spellman dated 9/10/82 re an a report at an appreance in this matter on 9/13/82. Attachments to letter. gc |
| 13 | 519 | ORDER (EPS 9/8/92) attys organizing nationwide pro bono program appear at hearing on 9/13/82. (EOD 9/20/82) gc |
| 13 | 520 | ORDER (EPS 9/8/82) Pltf's. ore tenus mot. to strike contractual provision precluding voluntary agencies from settling class members w/ extended family members in State of Fla. denied. w/o prejudice. (EOD 9/20/82) gc |
| 17 | 521 | MOTION for enlargement of time & memo of law. (defts) rd |
| 20 | 522 | MOTION to release Haitians in detention at Fort Allen. rd |
| 22 | 523 | ORDER (EPS 9/21/82) 1. it is the Court's intent to have representatives of the defts appear & make presentations at said seminars. 2. copies of these documents should be sent to Mr. Leiden & Mr. Arrango. EOD 9/28/82 rd |
| 28 | 524 | NOTICE of deportation of class member by USA. gc |
| Oct. 7 | 525 | MEMO of Law in Support of Motion to Release Haitians detained at Fort Allen. (Efren Rivera) ai |

| DATE | NR | PROCEEDINGS |
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| 8 | 538 | ADDITIONAL supplement to memo in support of motion for atty's fees & costs, by pltf. rmw |
| 8 | 539 | AFFIDAVITS in suport of motion for atty's fees & costs, by pltf. rmw |
| Oct* 27 | 540 | ORDER (EPS-9/27/82) granting motion for ext of time to resp to pltf's motion for atty's fees and costs. Defts have up to and including 10/8/82 w/in which to resp to motion. (EOD-11/15/82-CCAP). cs |
| Nov. 12 | 541 | ORDER (EPS-11/10/82) granting motion for ext of time to resp to pltf's motion for atty's fees and costs. up to and including 11/8/82. (EOD-11/15/82-CCAP). cs |
| 23 | 542 | MOTION of supplementary affidavits of Ira J. Kurzban & Bruce J. Winick by pltfs. rmw |
| 23 | 543 | AFFIDAVIT of Ira J. Kurzban. rmw |
| 23 | 544 | AFFIDAVIT of Bruce J. Winick. rmw |
| Dec. 9 | 545 | STATUS report, by gov't. rmw |
| 16 | 546 | COPY of letter from Ira J. Kurzban to Leon B. Kellner, Esq., dated 12/14/82 re "Status Report". rmw |
| 1983 | 547 | REPORT of the Court's Committee on Haitian refugees. rmw |
| Jan. 6 | 548 | ORDER: (EPS-1/4/83) setting hearing for 2/17/82. rmw |
| 6 | 549 | REQUEST for status conference & entry of order, by pltfs. rmw |



| DATE | NR | PROCEEDINGS |
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| Feb. 8 | 550 | MOTION to modify order of 6/29/82, by defts. NR____ rmw |
| 8 | 551 | MEMORANDUM in support of above mot, by defts. rmw |
| 8 | 552 | DECLARATION of Craig O. Raynsford. rmw |
| 11 | 553 | ORDER: (EPS-2/9/83) setting prehearing conference for 2/16/83. (EOD/2/24/83-CCAP) rmw |
| 24 | 554 | MEMORANDUM in support of request to consider paragraph 8 of final judgment, by pltfs. rmw |
| 24 | 555 | MEMORANDUM in support of this Court's authority to effectuate its judgment of 6/29/82, by pltfs. rmw |
| 24 | 556 | MEMORANDUM on issue of whether this court has jurisdiction to order the executive branch to expend funds by gov't. rmw |
| Mar. 1 | 557 | MEMORANDUM in support of modification of final judgment, by intervenors Jim Smith, Atty. Gen. & State of Fla. rmw |
| 1 | 558 | RECOMMENDED criteria for authorized secondary migration, by State of Fla. rmw |
| 1 | 559 | MOTION for civil contempt & memo, by pltfs. NR____ rmw |
| 2 | 560 | MOTION in response to modification of paragraph 5G of this Court's order of 6/29/82, by pltfs. NR____ rmw |
| 2 | 561 | REPLY to deft's memo on issue of whether this Court has jurisdiction to |

| DATE | NR | PROCEEDINGS |
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| | | order the executive branch to expend funds, by pltfs. rmw |
| 3 | 562 | REPLY to memo in support of this Court's authority to effectuate its judgment of 6/29/82, by gov't. rmw |
| 3 | 563 | MEMORANDUM in opp to pltf's request to consider paragraph 8 of the order of 6/29/82, by defts. rmw |
| 15 | 564 | PARTIAL ORDER: (EPS/3/9/83) Gov't's mot to modify the injunction which prohibits the holding of exclusion proceedings for class members not represented by counsel shall be postponed for at least 75 days pursuant to the Gov't's request made in open court. Pltf's mot to have the Court compel gov't to expend funds to effectuate this Court's Final Order is moot. Pltf's mot that the Court hold the Gov't in civil contempt for violating the Court's order of 2/17/83 denied. (EOD/3/16/83-CCAP) rmw |
| 07 | 565 | PARTIAL ORDER ON COMMITTEE REPORT: (EPS/2/28/83) (See file for details) rmw |
| 22 | 566 | ORDER: (EPS/3/21/83) Court adopts Robie plan for class members represented by pro bono counsel with modifications & additions. (See court file) (EOD/3/25/83-CCAP) rmw |
| 22 | 567 | ORDER: (EPS/3/21/83) Exclusion hearing procedure for class members |



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| | | represented by pro bono counsel. (See file for details) (EOD/3/25/83-CCAP) rmw |
| Apr. 11 | 568 | MOTION for order granting access to detained class members, by pltfs. NR____ rmw |
| 11 | 569 | MEMORANDUM in support of above mot, by pltfs. rmw |
| 15 | 570 | MEMORANDUM opinion & ORDER: (EPS/4/14/83) denying pltfs' mot to have the Court extend the benefits of the Court's Final Judgment to those class members who escaped detention prior to the entry of the Court's Final Judgment. (EOD/4/18/83-CCAP) rmw |
| 15 | 571 | MEMORANDUM opinion & ORDER: determination of venue or change of venue shall be dealt with & ruled upon as to each member of the class by the Immigration judge to whom said alien case is assigned in the same manner & based upon the same standard as would apply to any alien similarly situated. (See court file for further details) (EOD/4/18/83-CCAP) rmw |
| 18 | 572 | RESPONSE to pltfs' mot for order granting access to detained class members, by intervenor, State of Florida rmw |
| May 09 | 573 | ORDER: (EPS-5/6/83) denying as moot pltf's mot to obtain access to |

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| | | class members who arrived in So. Fla. on or after 4/4/83 & are currently being detained by the INS. (EOD/5/10/83-CCAP) rmw |
| 19 | 574 | MOTION for civil contempt agst Richard Sharkey & the District Director of Immigartion & Naturalization Service, District IV, w/memo, by pltfs. rmw |
| 19 | 575 | MOTION for order granting pltf's request for atty's fees, costs & expenses, w/memo, by pltfs. rmw |
| 20 | 576 | ORDER (EPS 5/20/83) on pltf's motions for civil contempt against Richard Sharkley & the District Director, INS, District IV and for entry of an Order granting pltf's request for atty's fees, costs, & expenses, & the Court having reviewed said motions & being otherwise duly advised in the premises; that defts shall respond to said motions w/in 10 days from date of this order (EOD 5/24/83-CCAP). ltj |
| 24 | 577 | SUBMISSION of supplemental authority, by pltfs. ltj |
| 27 | 578 | SUPPLEMENTAL motion & memo of law amending request for atty's fees in light of recent authority, by pltfs. ltj |
| June 1 | 579 | MOTION & memo of law for enlargement of time, by defts. ltj |



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| 2 | 580 | MOTION & memo of law for a continuance of the 6/10/83 hearing, by defts. ltj |
| 7 | 581 | MOTION & memo of law for enlarge- of time, by defts. ltj |
| 2 | 582 | RESPONSE to pltfs' motion for atyt's [sic] fees, costs & expenses, by deft. ltj |
| 9 | 583 | OPPOSITION to defts' response regarding atty's fees, continuation of the 6/10/83 hearing & motion for enlargement of time, by pltfs. ltj |
| 9 | 584 | ORDER (EPS 6/8/83) granting motion for continuance of 6/10/83 hearing & resetting hearing for 9:30 a.m. on 8/26/83. (EOD 6/9/83-CCAP). ltj |
| 10 | 585 | RESPONSE to motion for civil contempt by deft. ltj |
| 10 | 586 | ORDER (EPS 6/9/83) resetting hearing on deft's motion to partially modify final judgment is rest to 9:30 a.m. on 9/22/83. (EOD 6/10/83-CCAP). ltj |
| 10 | 587 | ORDER (EPS 6/9/83) granting motions for extension of time. Defts' shall have up to & including 6/2/83 w/in which to respond to the motion for atty's fees & up to & including 6/10/83 w/in which to respond to the motion for civil contempt. (EOD 6/10/83-CCAP). ltj |
| 14 | 588 | AMENDED ORDER (EPS 6/13/83): that the order dated 6/9/83 is amended & the hearing on deft's motion to partially modify final judgment is |

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| | | reset to 9:30 a.m. on 9/19/83. (EOD 6/14/83-CCAP). ltj |
| July 27 | 589 | MOTION to proceed pro hac vice pursuant to local rule 4(F), by petitioners, Carole Wood, Joyce Wilkerson & Leonard Rieser. ltj |
| 29 | 590 | ORDER (EPS 7/29/83): on the motion for injunction pending appeal filed by Philadelphia pltfs. ordered that defts shall file a response to said motion w/in 20 days from the date of this order. (EOD 8/5/83-CCAP). ltj |
| 29 | 591 | ORDER (EPS 7/28/83) to proceed pro hac vice (1) petitioners, Carol Wood, Joyce Wilkerson & Leonard Rieser may proceed pro hac vice to file a a [sic] motion to stay execution proceedings on behalf of Philadelphia pltfs; (2) Carole Wood is designated lead counsel; and (3) the local designation requirement is waived. (EOD 8/5/83-CCAP). ltj |
| Aug. 4 | 591A | MEMO of law in support of motion for injunction pending appeal, by pltfs. ltj |
| 4 | 592 | MOTION for injunction pending appeal, by pltfs. ltj |
| 8 | 593 | ORDER (EPS 8/5/83): concerning pltfs' motion for an emergency hearing on the matters presented in the motion requesting an injunction; shall be heard at a time to be determined upon the court's receiving the |



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| | | defts' response to the proposed agreement outlined above. (EOD 8/8/83-CCAP). ltj |
| 12 | 594 | ORDER (EPS 8/12/83): that all deportations of class member shall be stayed up to & including 8/28/83. Defts shall respond to said motion by 8/18/83. The court shall consider this matter between 8/18 & 8/28 & notify the parties as to how this issue should be addressed in light of the posture of the case. (EOD 8/15/83-CCAP). ltj |
| 19 | 594A | MEMO in opposition to pltfs' motions for an injunction pending appeal & 72 hours notice, by defts. |
| 29 | 595 | ORDER (EPS 8/26/83): temporarily re-extended stay pending determination of motions extended until 9/16/83 @ 5:00 p.m. This order & the prior orders of this court relative to this matter has not application to staying any exclusionary hearings that are now in rpogress [sic] & it is the intent of this order that such exclusionary proceedings shall continue unless otherwise ordered by this court. (EOD 8/30/83-CCAP). ltj |
| Sept. 13 | 596 | MOTION & memo of law for a continuance of the 9/19/83 hearing, by defts. ltj |
| 15 | 597 | ORDER (EPS 9/13/83): granting motion for continuance of the 9/19/83 |

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| | | hearing & setting status conference on 11/9/83. The purpose of said status conference is to set a new date for hearings relative to defts' motion to partially modify the final judgment to permit exclusion hearings to proceed w/o lawyers. (EOD 9/15/83-CCAP). ltj |
| 16 | 598 | MEMO opinion & ORDER (EPS 9/15/83): denying pltfs motions to enjoin exclusion proceedings for & deportation of class members & granting pltfs' motion for 72 hours notice prior to effecting physical deportation. (EOD 9/19/83-CCAP). ltj |
| 22 | 599 | MOTION & memo in support to reconsider memo opinion, by pltfs. ltj |
| 26 | 600 | ORDER (EPS 9/23/83): denying motion to reconsider memo opinion & order. (EOD 9/26/83-CCAP). ltj |
| NOV. 08 | 601 | APPLICATION for special appearance by Christopher Keith Hall Esq. dl |
| 22 | 602 | MOTION to withdraw without prejudice defts' mot to partially modify the the final judgment to permit exclusion hearings to proceed without lawyers. by defts. dl |
| DEC. 15 | 603 | ORDER (EPS-12/09/83) granting mot to withdraw wo/prej mot for modification of F/J (EOD-CCAP-12/16/83) dl |



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| 16 | 604 | ORDER (EPS-12/14/83) Setting hearing on 2/03/84 @ 9:30 a.m. (EOD-CCAP-12/19/83) dl |
| 28 | 605 | MOTION for ext of time by deft. jes |
| 1984 | | |
| JAN. 6 | 606 | MEMORANDUM in opp to pltf's request for award of costs by, deft. jes |
| 17 | 607 | ORDER (EPS-01/12/84) granting defts mot for ext of time up to & incl 01/06/84 for filing response to pltfs mot for tax costs (EOD-01/18/84 CCAP). jes |
| 27 | 608 | ORDER (EPS-1/25/84) Resetting hearing on 2/3/84 & 3/7/84 (EOD-CCAP-1/30/84 dl |
| FEB. 09 | 609 | REPLY to defts' memo in oppo to pltff's reques [sic] for an award of costs, by pltffs. dl |
| MAR. 20 | 610 | ORDER OF DISMISSAL by USCA by motion of appellant, Rule 42, FRAP and Rule 16 (EOD-3/27/84) by clerk dl |
| May 8 | 611 | ORDER by USCA denying motion of appellees for stay. (USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP). c |
| 8 | 612 | ORDER by USCA denying petition for rehearing. (USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP) c |
| 8 | 613 | MANDATE OF USCA-order of District Ct in this cause DISMISSED IN PART, REVERSED IN PART and |

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| | | REMANDED WITH INSTRUCTIONS + each pty bear their own costs. (USCA 5/4/84) (82-5772) (EOD-5/16/84-M-CCAP) ch |
| June 12 | 614 | ORDER EPS 6/8/84): on mandate that w/in 20 days from the date of this order pltfs shall file a memo of law reflecting their position. (EOD 6/14/84-CCAP). ltj |
| 19 | 615 | REPORT for Barry University. ltj |
| 20 | 616 | MOTION for enlargement of time in which to file brief, by pltfs. ltj |
| July 6 | 617 | ORDER (EPS 7/5/84) granting m/for extension of time to include 8/20/84 (EOD 7/10/84-CCAP). lcc |
| Aug. 21 | 618 | MOTION w/memo in support for leave to file brief in excess of 20 pgs, by pltf. lcc |
| 21 | 619 | MEMORANDUM on effect of Issuance of mandate, by pltf. lcc |
| Sept. 11 | 620 | MOTION for extension of time to respond to order on mandate, for a 30 day extesnion, by deft. lcc |
| 11 | 621 | MEMORANDUM in support of m/for extension of time, by deft. lcc |
| *10 | 622 | ORDER (EPS 9/6/84) granting leave to file brief in excess of 20 pages (EOD 9/12/84-CCAP). lcc |
| 25 | 623 | ORDER (WPS 9/19/84) granting defts' motion for ext of time w/i which to file memo in resp to court's 6/8/84 order up to & incl 10/13/84 (EOD 9/28/84 CCAP) mas |



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| Oct. 15 | 624 | MEMO in response to order on mandata & pltf's memo, by defts. ltj |
| 1985 | | |
| JUNE 19 | 625 | NOTICE of reliance on addtl authority, by pltfs. mas |
| JULY 5 | 626 | SUPPLEMENTAL Memo in support of Atty's fees expenses and costs under the equal access to justice act. by pltf jl |
| 22 | 627 | MEMO in Resp. to pltf's Suppl. Memo on Atty's fees., [sic] by deft. vp |
| 24 | 628 | SUPPLEMENTAL AFF. of atty's feess [sic] for M.J. Rosen from 3/7/84 to 3/25/85. vp |
| 24 | 629 | SUPPLEMENTAL AFF. of atty's fess [sic] for M.J. Rosen from 8/9/82 to 3/25/85. vp |
| 24 | 630 | SECOND SUPP. AFF. of Robert E. Juceam. vp |
| 24 | 631 | SUPPLEMENTAL AFF. of Atty's fees for B.J. Winick from 5/17/83 to 7/23/85. vp |
| 24 | 632 | SUPPLEMENTAL AFF. of Atty's fees for I.J. Kurban from 5/17/83 to 7/3/85. vp |
| 24 | 633 | SUBMISSION of Bills for Costs & Expen. for 5/16/83 to 7/22/85. |
| 24 | 634 | SUBMISSION of Costs, Expen. & Fees to 7/1985, by pltfs. vp |
| 24 | 635 | AFFIDAVIT of Irwin P. Stotzky.. [sic] vp |
| AUG. 2 | 636 | a motion to Substitute pleadings by pltf. jl |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 6 | 637 | REPLY Memo. in support of Attys Fees, Expenses and Costs under the Equal Access to Justice Act. by plft jl |
| 15 | – | RECORD ret'd consisting of 64 vols and exh 6 boxes * 8 of 10 boxes rec'd 8-15-85) ak jl |
| 21 | – | RECORD ret'd consisting on box 1 of 10 on 8-21-85 jl |
| **16 | – | RECORD ret'd consisting ofn [sic] box 10 of 10 on 8-16-85 jl |
| AUG. 30 | 638 | RELIANCE on Suppl. auth. by pltf. jl |
| SEPT 13 | 639 | SECOND Notice of reliance on suppl. auth by pltf jl |
| 24 | 640 | EMERGENCY verified mot for Civil Contempt & issuance of temporary restraining order to permit Haitian refugee center Inc. representatives to enter the Krome Detention Facility, by Pltfs. c |
| | 641 | ORDER (EPS 9-24-85) Defts are to provide the following info. 1) Whether any class members are presently beging detained. 2) Names of any class members. 3) Brief statement as to why each has been denied parole. EOD (9-27-85) CCAP. jl |
| 25 | 642 | ORDER (EPS-9/24/85) DENYING Emergency Verified M/ for Civil contempt & issuance of T/R/O to permit Haitian Refugee Center Inc's representatives to enter the Krome detention facility, (EPS-9/24/85-CCAP) dl |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| OCT 3 | 643 | MOTION Concerning order on remand and order denying emergency verified mot. for civil contempt and memo. by plft jl |
| 15 | 644 | RESPONSE to order on remand, by U.S.A. nh |
| NOV 12 | 645 | EMERGENCY Mot. for Contempt and to enjoin exclusion hearing set for Class members by plft jl |
| 14 | 646 | AFFIDAVIT of Rudolph Aragon (Re: ext. of time.) nh |
| *OCT 17 | 647 | MOTOIN [sic] For Class Decertification by defts jl |
| 17 | 648 | MEMO in support by defts jl |
| DEC 6 | 649 | ORDER (EPS 12-6-85) Hearing to determine total number of hrs and reasonable hourly rate for attys. Consideratoin [sic] as to whether fees should be enhanced for any reason. Payment of this award is delayed. EOD (12-10-85) CCAP. jl |
| 9 | 650 | ORDER (EPS-12-9-85) Ptys submit memo. within 10 days form [sic] date of this order. EOD (12-13-8) CCAP. jl |
| 16 | 651 | ORDER: Cause is set for Cal. call on 1-30-86 at 9:00 A.M. Non Jury-trial will be commc. on 2-3-86 at 9:A.M. jl |
| 19 | 652 | MOTION For one wk enlargement of time to file Memo. by plft jl |
| | 653 | MEMO. in response to the Court's 12-9-85 Order by deft jl |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 19 | 654 | NOTICE of amendment to plft's mot. for one wk enlargement of time to file memo. by plft jl |
| | 655 | MOTION For one wk enlargement of time to file memo. bly plft jl |
| | 656 | ORDER (EPS 12-19-85) Granting mot. for ext of time up to 12-26-85. EOD (12-27-85) CCAP. jl |
| 26 | 657 | MEMO. on the cont. Viability of injunctions Contained in Final Judgment by plft jl |
| 1986 | | |
| JAN 7 | 658 | NOTICE Of hearing on oral agrument concerning cont. of injunction sch for 1-27-86 at 9 A.M. (EPS 1-7-86) jl |
| 24 | 659 | MOTION to correct the addition to costs & expenses, by pltfs. cf |
| 24 | 660 | THIRD submission of bills for costs & expenses for period July 25 [sic] 1986 thru January 24, 1986, by Ira J. Kurzban, Esq. cf |
| FEB 3 | 661 | MOTION For Reconsideration by deft jl |
| 5 | 662 | RESPONSE to defts Mot. for reconsideration by plft jl |
| 12 | 663 | ORDER ON MANDATE (EPS 2-12-86) that Final Judgment is modified only insofar as Supreme Court decision requires. In all other respects the various provisions of the Final Judgment's injunctive relief remains in effect. (EOD 2/18/86-CCAP-M). |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| FEB 13 | 664 | ORDER (EPS 2-13-86) Denying mot. to reconsider deft mot. of Court order of 12-6-85. EOD (2-19-86) CCAP. jl |
| 19 | 665 | EMERGENCY Verified mot. for Civil comtempt [sic] ans [sic] issuance of a temp restraining order enjoining deft from Mass Sch. of Class Members Hearing. by pltf jl |
| 19 | 666 | ORDER (EPS 2-19-86) Granting mot. to correct add of Costs and expenses. EOD (2-22-86) CCAP. jl |
| 20 | 667 | ORDER (EPS 2-20-86) Denying Emergency mot. for a Civil Contempt and issuance of a temp. restraining order. EOD (2-22-86) CCAP. jl |
| 21 | 668 | SUPPL. to plfts' 2-19-86 emergency verified mot. for Civil Contemtp and issuance of a T.R.O. by plft jl |
| 24 | 669 | MOTION To reconsider order denying emergency mot. for Civil Contempt and issuance of a temp restraining order by pltf jl |
| 24 | 670 | MOTION to Amend Judgment by deft jl |
| | 671 | MEMO. in support of Mot. to Amend Judgment jl |
| 25 | 672 | ORDER (EPS 2-25-86) Denying as mmot pltfs emergencye [sic] mot. to reconsider. EOD (3-17-86) CCAP. jl |
| *24 | 673 | MOTION To Amend Judgment by defts jl |
| | 674 | MEMO in support of Mot. to Amende [sic] Judgment jl |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| MAR 7 | 675 | MEMO. of points and auth. in support of reimbursemtn [sic] of travel subsistence, telephone and psotage [sic] charges. by plft jl |
| | 676 | CERT. of Ser. jl |
| 28 | 677 | MOTION for ext. of time for filing proposed findings. nh |
| APR 3 | 678 | ORDER (EPS 4/3/86) granting Motion for exten. of time. ls |
| MAY 12 | 679 | PROPOSED findings of fact by pltfs ls |
| 30 | 680 | POST-HRG proposed fin;dings [sic] of fact by pltf. ls |
| JUNE 30 | 681 | SUBMISSION of add. auth by pltf ls |
| AUG 29 | 682 | MEMO OPINION (EPS 8/29/86) on fees, costs & expen. (see file for amts) ls |
| SEPT 8 | 683 | SUBMISSION of attys fees aff by pltf ls |
| 8 | 684 | MOTION to amplify Ct. order for entry of judgmt on atty fees by pltf ls |
| 8 | 685 | AFFIDAVIT of Sandra Lipsman ls |
| 10 | 686 | ORDER (EPS-9/10/86) vacating order of 8/29/86 until it examines circums & determines what measures to take to correct sit. (EOD 9/11/86-ccap) ls |
| OCT 1 | 687 | CORRECTED memo opin (EPS 10/1/86) & order on atty fees, costs, expen. (EOD 10/7/86-ccap) |
| 23 | 688 | *NOTICE OF APPEAL* by defts. from Corrected Memo Opinion & Order on attys fees, costs, & expenses entered 10/1/86, which replaced Court's |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | 8/29/86 order (vacated by order of 9/10/86). (Copies to USCA, attys of record, Ct. Reporter Coord.) (FEE NOT PAID). cs |
| Nov. 12 | – | USCA receipt for NOA-Case No. 86-5887. nh |
| 1987 | | |
| Jan 8 | – | *RECORD ON APPEAL* transm. to USCA, consisting of 3 vols. pldgs., 2 vols. transc., & 1 accordian folder of exhs. (pldgs.). (USCA #86-5887). cs |
| Jan. | – | ACK recpt of ROA on 1/15/87 (USCA 86-5887). caf |
| Apr. 21 | 689 | ORDER (ES 4/20/87) to show cause why rptg provisions of Final Judgment should not be revoked (EOD 4/28/87 CCAP). caf |
| May 6 | 690 | MEMORANDUM in resp to crt's 4/20/87, Order to show cause, by deft. caf |
| 7 | 691 | ORDER (EPS 5/6/87) Vacating rpt provisions of final judgment relasing [sic] Barry University from further responsibility in matter (EOD 5/12/87 CCAP). caf |
| June 19 | 692 | ORDER of USCA Denying writ of mandamus, petr M/consolidate appeal is Denied (6/15/87 87-5438 86-5887) (EOD 6/23/87 CCAP-M). caf |
| July 6 | 693 | *NOTICE OF APPEAL* from the Order entered on 5/7/87 by Alan Nelson. (COPIES to USCA., US. Atty., Di- |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | rector of Immigration, Michael P. Linderman, Attys Rcrd. Crt. Rep. Coord.) NO FEE REQR'D (EOD 7/7/87-CCAP) dl |
| 31 | 694 | MOTION to req appellant to provide entire transcript to the crt of appeals purs rule 10(b)(3) of the FRAP, by pltfs. caf |
| Aug. 18 | 695 | TRANSCRIPT of hrg on 1/27/86 pge 1-82. caf |
| 26 | 696 | OPPOSITION to mot to require appellant provide the entire transcript to the court of appeals pursuant to rule 10(b)(3) of the Federal Rules of appellate procedure, by defts-appellants. caf |
| 26 | 697 | SUR REPLY to appellees' reply to appelants's [sic] opp to provide the entire transcript of proceedings, by defts-appellants. |
| 26 | 698 | DESGNATION [sic] of transcripts pursuant to court order of 8/21/87. |
| *24 | 699 | ORDER (EPS 8/21/87) MOTION is hereby DENIED w/o prej to appellee's complaince [sic] with Rule 10(b)(3) by serving on the appellant a designation of additional parts to be included, & reserving to the appellee, if necessary, the right to reapply to the Court. (EOD 8/29/87-CCAP). caf |
| Sept. 1 | 700 | OBJECTION to pltfs-appellee' Designation of transcripts purs/crt order |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| | | of 8/21/87, by defts-appellants. caf |
| *28 | 701 | REPLY to appellants' opp/provide the entire transcript of proceedings, by appellees'. caf |
| 24 | – | *RECORD ON APPEAL* transm to USCA consisting in 4 vols pldgs. 3 vol transcp 2 Accord Folder 1 of Exhbs. 1 th 5 & 1 containing DE #512 (86-5887 and 87-5582) caf |
| Oct. 1 | 702 | ORDER (EPS 9/30/87) directing deft/appellant to provide transcripts (EOD 10/14/87 CCAP). caf |
| 2 | 703 | ORDER (EBD 10/2/87) that lines 8 & 9 of crt's order directing deft/appeallant [sic] corrected to read appellant/pltfs & appeallant [sic] /pltf shal comply w/order immediately (EOD 10/14/87 CCAP). caf |
| 23 | – | USCA ack receipt of Certified ROA consisting of 4 vols pldgs, 3 vols transcripts & 2 accordian folders w/exhibits & De#513, (86-5887 – 87-5582). caf |
| 1988 | | |
| JAN 20 | 704 | TRANSCRIPT of hrg on 2/16/83. (pgs. 1-96). hy |
| 20 | 705 | TRANSCRIPT of hrg on 2/17/83. (pgs 97-328). hy |
| Mar. 11 | – | *FIRST SUPP. RECORD ON APPEAL* transm. to USCA, consisting of 2 vols. transc. #704 & #705. (USCA-# 86-5887 & 87-5582) nj |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| MAR 29 | – | RETURN from USCA ack recpt of CERT. ROA. (2 Vols transcripts) (1st Supp ROA #704 & 705 TRANSC.) (USCA # 87-5582). hv |
| JUL 28 | 706 | TRANSCRIPT of Hrg on 1/27/86 pgs 1-82. lis |
| 28 | 707 | TRANSCRIPT of Hrg on 2/6/86 Vol 1 pgs 1-188. lis |
| 28 | 708 | HEARING proceedings on 2/24/86 Vol 2 pgs 1-195. lis |
| 28 | 709 | TRANSCRIPT of hrg on 2/26/86 Vol 4 pgs 1-42. lis |
| 28 | 710 | TRANSCRIPT of hrg on 3/7/86 Vol 5 pgs 1-143. lis |
| 25 | 711 | MANDATE OF USCA-Reversing Judgment of District Court & Remanding cause to District Court in accordance w/Opinion of USCA. (USCA 10/11/88) (USCA 87-5582) (EOD 10/31/88-M-CCAP). 8 vols of ROA & 1 accd. folder ret'd from USCA. lis |
| 1989 | | |
| FEB 2 | 712 | MANDATE OF USCA-Affirming in part & Vacating & Remanding cause to District Court for recalculation of atty's fees & expenses in accordance w/Opinion of USCA. (USCA 1/25/89) (USCA 86-5887) (EOD 2/2/89-M-CCAP) w/Opinion. 5 vols of records & 1 env of exh ret'd from USCA. lis |



| DATE | NR | PROCEEDINGS |
|---|---|---|
| *JAN 31 | 713 | ORDER (EPS 1/30/89) on MANDATE: Any remaining inj relief entered in favor of pltfs in this matter is hereby VACATED. (EOD 2/3/89-CCAP). lis |
| FEB 1 | 714 | ORDER (EPS 2/1/89) SETTING status conf on 2/28/89 @ 8:30 a.m. & ptys file a joint status rpt no later than 2/15/89. (EOD 2/3/89-CCAP). lis |
| 9 | 715 | ORDER (EPS 2/9/89) VACATING Court's Order dated 2/1/89. Status rpt & status conf will be resch when mod mandate is ret'd from USCA (EOD 2/13/89-CCAP). lis |
| *7 | – | Letter from USCA in re; Mandate iss. on Jan. 25, 1989 to be returned to USCA w/judgment ASAP. njf |
| MAY 22 | 716 | REQUEST for hrg on remand, by Pltfs. agd |
| JUNE 1 | 717 | ORDER (EPS 5/31/89) SETTING status conf for 7/7/89; ptys file jt statu rpt no later than 6/26/89 (EOD 6/6/89-CCAP). fr |
| SEPT 19 | – | *RE-TRANSMITTED ROA* to USCA. (7 vol pldgs, 6 vol transc & 2 acc folders of exh) (#86-5887). mc |
| DEC 15 | – | ACK receipt of re-Transmitted ROA to USCA (7 vols pldgs, 6 vols trnasc & 2 vols of accordian (exhs) USCA #86-5887. agd |

| DATE | NR | PROCEEDINGS |
|---|---|---|
| 26 | – | RETURNED ROA consisting of 9 vols & 2 Envelopes of exhs. USCA #87-5582. agd |



IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 86-5887

MARIE LUCIE JEAN, ET AL., PLAINTIFFS-APPELLEES

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS-APPELLANTS

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**DOCKET ENTRIES**

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| DATE | PROCEEDINGS |
|---|---|
| 7/10/87 | Each box contains one copy of the appellee * * * and 10 volumes of appendix to the brief. ih |
| 7/29/87 | Received for screening. (lt) |
| 8/25/87 | According to MJC, since Spellman is out of same district as Arnovitz (who will be sitting on panel #8 for Mon. & Tues, 9/28 & 29/87) this case must be set before Judge Carr (who will be sitting on Wed. & Thurs. 9/30 & 10/1/87) BJJ |
| 9/21/87 | JLE recused. Per JCH, remove from calendar since it is week before and TAC is sitting on other panel in Atlanta for week. bjj |
| 9/21/87 | Advised cnsl. bjj |
| 2/27/88 | Per Irene Hendrix, change style to reflect the new director Alan C. Nelson. NH |

| DATE | PROCEEDINGS |
|---|---|
| 2/17/89 | Per Mike Singer, appellant does not object to motion to file bill of costs out of time. dfb. |
| 12/18/89 | ROA—sent to Supreme Court. Vol. 5 req. from District Court. bfw |
| 1/18/90 | Vol. 5 sent to Supreme Court. bfw |
| 9/14/89 | Flg. Appellants' Motion for Additional Stay of Mandate Pending Certiorari. bfw |
| 9/15/89 | Flg. Supplement to Appellants' Motion for Additional Stay of Mandate. bfw |
| 9/15/89 | Flg. Appellee's Opposition to Motion for Additional Stay of Mandate. bfw |
| 9/21/89 | Flg. Order: Motion for further stay is GRANTED until 10/14/89. (TAC) bfw |

TITLE Jean -v- Weissner, et al

No. 86-[illegible]

87

## 1. RECORD, EXHIBITS AND BRIEF INFORMATION

| Filed | | Due |
|---|---|---|
| 11/12/86 | Appeal Information Sheet | |
| | Court Reporter Acknowledgment | |
| | Transcript | on file |
| | Record on Appeal | |
| | Partial Record or Cert. List | |
| 1/15/87 ✓ | Record on Appeal — No. of Vols. 5 (I) | |
| | Supp. Record — No. of Vols. | |
| | Second Supp. Record — No. of Vols. | |
| 1/15/87 ✓ | Exhibits 1 ☒ Env ☐ Box ☐ Pkg. ☐ Roll | |
| | Exhibits ☐ Env ☐ Box ☐ Pkg. ☐ Roll | |
| | Briefing Notice Issd. | 3/26/87 |
| 5/6/87 ✓ | Brief for Appellant 5/5D | 5/5/87 |
| | Brief for Appellant | |
| 5/6/87 ✓ | Record Excerpts | |
| | Brief for Appellee | (S4b 7/87 |
| *7/6/87 ✓ | Brief for Appellee 7/5D | 7/6/87 |
| | Brief for Cr. Appellee | |
| 7/24/87 ✓ | Reply Brief for Appellant 7/22D | 7/22/87 |
| | Supp. Brief for Appellant | |
| | Supp. Brief for Appellee | |
| | Brief for Amicus | |
| | Intervenor | |
| 10/26/87 | Supp. Authority (Aple) CE | |
| 11/20/87 | Supp. Authority (Apnt) CE | |
| *7/10/87 ✓ | 10 Vol. Appendix (See SN) | |
| 7/1/88 | Supp. Auth. (Apnt) CE | |
| 7/27/88 | Supp. Auth. (Aple) CE | |
| 9/14/88 | Supp. Auth. (Apnt) CE | |

## 2. AGENCY REVIEW CASES

- Petition for Review of Order ( ) of
  ☐ NLRB ☐ FPC ☐ _____
- Application for Enforcement — NLRB
- Answer to Application for Enforcement
- Cross Application for Enforcement
- Summary Entry of Judgment
- Appl. for Entry of Supp. Judgment

## 3. MISCELLANEOUS FILINGS

- Sup. Notice of Appeal and D.C. Docket Entries
- Papers Trans. from Misc. No. _____
- Order of DC Granting Appeal IFP
- Order of DC Appointing Counsel
- Affidavit of Financial Status
- CJA 20 Issd./Voucher Recd. _____
- CJA 21 for Transcript

3/25/87 Prob. juris. noted

## 4. EXTENSION Flg. Motion for:

| | | Order Fld. | Est. to: |
|---|---|---|---|
| | Appeal Information Sheet | | |
| | Record, Trans. | | |
| | Record Trans. | | |
| | Appellant's Brief | | |
| | Appellant's Brief | | |
| | Appellant's Brief | | |
| | | | |
| 6/2/87 | Appellee's Brief | | 21 days from rule |
| | Appellee's Brief | | mot. to dis. JL |
| | Appellee's Brief | | |
| | | | |
| | Reply Brief | | |
| | | | |
| | | | |

## 5. CALENDAR INFORMATION

Non Argument Panel: _____

9/9/87 Case Assigned for 9/30/87 ☐

☒ Atl ☐ Mont ☐ Jax ☐ Mia ☐ _____

9/21/87 Case Cont'd for Reassignment

10/9/87 Case Reassigned for 11/7/87 ☐

☐ Atl ☐ Mont ☐ Jax ☒ Mia ☐ _____

Hearing Panel: PAK/TAC/ESCHBACH

11/7/87 Case Argued ☒ by Appellant ☒ by Appellee

_____ Case Sub. w/o Arg. ☐ by Appellant ☐ by Appellee

Writing Judge: _____

## 6. OPINION INFORMATION XXX Pub _____ NonPub

12/27/88* Opinion Rendered

Affirmed: TAC AFFIRMED in pt.

Reversed: VACATED and REMANDED

Aff'g in Pt. _____ P.C. _____ Conc. Spec.

Vacated: XXX Signed _____ Dis.

Dismissed _____ Rule 25 PAK Dis. in Pt. &

Opinion Withdrawn: conc. in p

_____ Mand. Remand

*Issued in manuscript form. Slip p.

## 7. REHEARING INFORMATION

1/10/89 Mot. for Ext. -Ext. to 2/13/89 SF

_____ Mot. for Ext. -Ext. to

_____ Mot. for Ext. -Ext. to

2/13/89 Petition for Rehearing ACN

☒ Appellant ☐ Appellee ☐ Reg. ☐ E. Banc

_____ Petition for Rehearing

☐ Appellant ☐ Appellee ☐ Reg. ☐ E. Banc

_____ Response of

5/17/89 ✓ Order Denying Rehearing

_____ Dissenting

☐ Opinion §9

☐ Order on Petition for Rehearing §9

NO 86-5887

8. MOTIONS

| Filing Motion to or for | | Response Filed By | Date | Granted | Denied | By Court | By Clerk | Date |
|---|---|---|---|---|---|---|---|---|
| | Mandamus | | | | | | | |
| | Reinstate Appeal | | | | | | | |
| | Stay Further Proceedings in CA | | | | | | | |
| | Stay Pending Appeal | | | | | | | |
| | Injunction Pending Appeal | | | | | | | |
| | Consolidate Appeals W. No | | | | | | | |
| | Leave to Appeal IFP | | | | | | | |
| | Bail Pending Appeal | | | | | | | |
| | Withdraw as Counsel | | | | | | | |
| | Appointment of Counsel | | | | | | | |
| | Leave to File Supp. Record | | | | | | | |
| | Leave to File Brief in Excess Pgs | | | | | | | |
| | Dismiss by Appellant | | | | | | | |
| 6/1/87 | Dismiss by Appellee w/memo | appellants | 6/10/87 | | XXX | PTF-RLA-JL | | 6/15/87 |
| 2/26/88 | Amicus Curiae | APPELLEES | 3/3/88 | | XX | TAC | | 3/11/88 |
| | Leave to File Supp. Brief | | | | | | | |
| 5-24-89 | Stay of Mandate | appellants | 5/25/89 | XXX | | TAC | | 6/01/89 |
| | Recall Mandate | | | | | | | |
| | Expedite Appeal | | | | | | | |
| | Remand | | | | | | | |
| | Limited Remand | | | | | | | |
| | | | | | | | | |

9. OTHER DOCKET ENTRIES

| | |
|---|---|
| 6/4/87 | Flg. appellants' motion for 15 days ext. to file response to motion to dismiss ih |
| 6/5/87 | Flg. Order DENYING 15 day extension. Response shall be in this office no later than 6/10/87 before the close of business. RLA |
| 3/30/88 | Flg. Supp. Authority by Appt. (CE'd) |
| 7-5-88 | Flg. Supp. Authority By Appellee (CE'D) |
| 7/7/88 | Flg. response to Supp. Auth. of appt. (CE'D) |
| 1-13-89 | Flg. appellees' motion for leave to file bill of costs out of time.dfb (GRANTED by dfb on 1/17/89).dfb. |
| 1/20/89 | Flg. Order: The order granting appellees' motion to file bill of cost out of time is VACATED and the Clerk should note on its records that each party bear its own costs. TAC |
| 5/31/89 | Flg. Appellees' Response to Appellant's Opposition to a Stay of the Mandate. bfw |
| 6/16/89 | Flg. Motion to Further Stay Mandate. bfw (GRANTED 6/23/89 TAC) bfw |
| 7/21/89 | Flg. Motion for Additional Stay of Mandate. bfw (GRANTED 7/25/89 TAC)bf |
| 8/14/89 | Flg. Motion for Additional Stay of Mandate. bfw (GRANTED 8/15/89 TAC)bf |

10. JUDGMENT OR MANDATE INFORMATION

| | |
|---|---|
| -17-89 | Bill of Costs (MOOT See s9f |
| | Obj. to Bill of Costs |
| 2/27/88 | Rlg & Entg Judgment |
| | Issg Copy of Jdgt to Bd & Cnsl |
| | Jdgt as Mdt Issd to Clerk |
| | Jdgt as Mdt Reissd to Clerk |
| | Dismissal Issd to Clerk 1 envelope |
| 1/25/89 | Record on Appeal Retd to Clerk 5 volumes |
| | Exhibits Retd to Clerk |
| | |
| | Mandate Stayed to |
| /1/89 | Mandate Recalled due to Clerical Error. bfw |

11. SUPREME COURT INFORMATION No 89-601

| | |
|---|---|
| | Preparing Proceedings on Certiorari |
| | Preparing Supp. Proceedings on Cert |
| | Transmitting Orig. Exhibits to S.C. |
| 8/14/89 | Order of S.C. – Ext. to 9/14/89 |
| 10/26/89 | Notice of Rlg of Cert. Pet. on 10/13/89 |
| 1/24/90 | Order of S.C. ☐ Denied ☒ Granted 1/22/90 |
| | Notice of Denial of Pet. for Rehearing |
| | Opinion of S.C. dated |
| | Judgment of S.C. |
| 9/18/89 | Order of S.C. Ext. to 10/14/89 |
| | |

Page 4 of 4 pages

Haitian Policy

20 MAR 1981

Kenneth W. Starr
Counselor to the
Attorney General

David Crosland
Acting Commissioner

## I PURPOSE

Because of the increasing influx of Haitian undocumented aliens arriving in the south Florida area it is necessary to identify secure detention sites to accommodate as many as 4,500 undocumented Haitians and to provide sufficient funds, personnel and equipment to manage these detention centers and provide the necessary deportation and exclusion hearings and other support functions necessary to effect the prompt expulsion to Haiti of these aliens.

## II PRESUMPTIONS

- That the flow of undocumented Haitians will continue at a monthly rate of 1,500 persons.
- That all Haitian arrivals and those encountered by INS in south Florida will be placed in detention pending their expulsion from the United States.
- That aliens will immediately be served with notice to appear for exclusion hearings before they can make asylum applications to the District Director, thus cutting off that option.
- That Department of State will detail a sufficient number of asylum officers to the detention center to work directly with INS in order to cut advisory opinion processing time to 24 hours or less (critical).

- That Immigration and Naturalization Service (INS) will be provided with adequate staffing to run hearings.
- That the appeal rate to the Board of Immigration Appeals (BIA) will be approximately 40%.
- That no injunctions or other court orders will hold up or modify processing.
- That it will require approximately one–three months to complete the administrative process and expel the aliens, assuming that sufficient funds and resources are made available.
- That sufficient detention space and resources are made available to detain up to 4,500 aliens pending their removal from the United States.
- That the funds requested are for a six month period.

III. *Procedures*

A. *Arrival/Entry of Haitian Undocumented Aliens*

Haitian undocumented aliens encountered by INS are processed by INS for both exclusion and deportation hearings. Upon arrival, they are subject to the exclusion process, while those who succeed in entering the United States surreptitiously but who are subsequently apprehended by INS, are placed under the deportation process.

B. *Asylum Request*

Asylum requests may be made to an INS district director by those Haitians for whom deportation or exclusion proceedings have not commenced. Haitians who make requests for asylum in exclusion or deportation proceedings will make such



requests directly to the immigration judge. When the asylum request is made the hearing will be adjourned for the purpose of requesting an advisory opinion from the Bureau of Human Rights and Humanitarian Affairs (BHRHA) of the Department of State. The judge will not request such opinion if an opinion has been received in connection with a previous application made to a district director, unless the immigration judge finds in his discretion, that the circumstances have changed so substantially since the prior opinion was provided that a second referral would materially aid in adjudication of the asylum request.

C. *Expulsion*

Haitians, upon arrival, will be detained at INS detention centers to await exclusion proceedings. If ordered excluded and no request for an advisory opinion or other administrative or court stay is pending, appropriate travel documents will be obtained from the Haitian authorities, as necessary, to facilitate their deportation to Haiti.

D. *Administrative Proceeding*

1. *Time Frame*

In most cases, the administrative process will be completed in 5 to 12 weeks. Based on the Cuban hearing experience, the time frames for the specific processes should be as follows:

- Opportunity to obtain attorney (1 week).
- Continuance to prepare asylum request, whether represented or unrepresented (1 week).

- Hearing on merits (1 hour, based on Cuban experience).
- If administrative appeal is waived, the alien is ready for removal. No need for transcription of record.
- If appealed to Board of Immigration Appeals, record must be transcribed (1 week).
- Forwarding of record to BIA, receipt, and assignment to staff attorney (1 week).
- BIA decision (1 to 6 weeks, depending on whether oral argument is requested).
- Return of files from BIA and making of travel arrangements for return (1-2 weeks).
- Total time elapsed for cases where administrative appeal taken approximately 6 weeks to 12 weeks.
- If judicial review by habeas corpus is sought in U.S. District Court, time is impossible to predict (anywhere from one month to one year).
- Court of Appeals review may take even longer.

IV. *Resources*

A. *Facilities*

Illegal Haitian aliens will continue to arrive in the Florida area at the monthly rate of 1,500 persons. Allowing for 1-3 months of processing time, sufficient detention will be required to house up to 4,500 Haitians.

The Krome Avenue North Service Processing Center (SPC) when renovation and expansion is



completed, and with sufficient staff, will house up to 1,000 aliens. The Krome Avenue South site, which was used during the Cuban program, will accommodate up to 500 aliens in permanent and temporary (tent) quarters. In addition, local Florida non-INS detention facilities can provide space for up to 240 aliens. These three options provide INS with a detention capability of 1,740 spaces in the Florida area. An additional 2,000 to 3,000 aliens can be detained at Ellington Air Force Base, Houston, Texas. This site was selected by the Cuban/Haitian Task Force as the most suitable site to house additional Cuban arrivals. It can house up to 2,000 in permanent buildings. The additional 1,000 spaces required can be accomplished by erecting temporary quarters. Photographs of the site are attached.

Medical and social services for those three sites will be provided by Health and Human Services (HHS).

The resources required to operate the above facilities is discussed below.

B. *Manpower*

To enable the Service to receive, detain, and process the aliens at the above facilities, a substantial increase in manpower is required. Needed additional detention manpower at the facilities is as follows:

| *SITE* | *REQUIRED POSITIONS* | *CAPACITY* |
|---|---|---|
| Krome North SPC | 105 | 1,000 |
| Krome South | 50 | 500 |
| Ellington | 295 | 3,000 |

Furthermore, to provide the necessary exclusion hearings in a timely manner, additional Immigration Judges, Trial Attorneys and support personnel are required. Assuming each Immigration Judge should be able to handle 8-10 hearings per day, the following positions above the current staffing are needed.

| | |
|---|---|
| 7 | Immigration Judges |
| 7 | Trial Attorney |
| 7 | Transcribers |
| 7 | Interpreters |
| 7 | Docket Clerks |
| 4 | Clerk Typists |
| 39 | |

Immigration Inspectors and Adjudicators will be necessary at each detention site to prepare the necessary documentation to initiate exclusion proceedings. The following positions above the current staffing are required.

| | |
|---|---|
| 3 | Inspectors |
| 3 | Examiners |
| 9 | Interpreters |
| 5 | Clerks |
| 20 | |

C. *Equipment*

Additional vehicle equipment purchases are necessary at each facility. These vehicles will be used to transport Haitians from point of apprehension to the facilities, and also from the facilities to the point of departure. The required vehicles at each facility are as follows:



| *LOCATION* | *BUSES* | *VANS* |
|---|---|---|
| Krome North | 2 | 2 |
| Krome South | 1 | 2 |
| Ellington | 4 | 2 |
| TOTAL | 7 | 6 |

D. *Funds*

The following is a summary of the necessary resources needed for this operation. As previously stated, all cost estimates are for a six month period. The dollars shown are in thousands.

| | *Sub-Total* | *Total* |
|---|---|---|
| 1. *Krome North* | | |
| Positions (105) | $1,187 | |
| Equipment | 320 | |
| Supplies | 101 | |
| Operational | 1,487 | $3,165 |
| 2. *Krome South* | | |
| Positions (50) | 565 | |
| Equipment | 170 | |
| Supplies | 120 | |
| Operational | 734 | 1,589 |
| 3. *Ellington* | | |
| Positions (295) | 3,334 | |
| Equipment | 620 | |
| Supplies | 701 | |
| Operational | 4,401 | 9,056 |
| 4. *Legal Staff* (39) | | 722 |
| 5. *Inspection/Adjudication* | | 274 |
| 6. *Non-Service Detention* The use of non-service detention, with a capacity of 240 will require funds in the amount of | | 1,002 |

7. *Alien Travel*
   Travel funds required to transport aliens expelled from Texas and Florida are estimated to be 919
   Total Six Month Cost ..... $16,xxx



**Bond, Asylum, and Exclusion Processes**

I Bond

A. Excludable aliens (aliens at border)

1. Statute (8 U.S.C. 1223, 1225(b)) permits INS to detain any arriving alien who is not "clearly and beyond a doubt entitled to land" for further examination.

2. No specific statutory provision for granting release on bond to excludable aliens.

3. Regulations (8 C.F.R. 212.5(a); 8 C.F.R. 235.3(b)) allow INS district director to parole inadmissible aliens pending hearings under suitable conditions, including giving of a bond.

4. Denial of parole is not administratively appealable.

5. INS takes position that court cannot order INS to parole inadmissible alien. Cf. *U.S. ex rel. Shaughnessy v. Mezei,* 345 U.S. 280 (1953).

B. Deportable aliens (aliens who have entered the United States)

1. Statute (8 U.S.C. 1252(a)) permits INS to arrest and take into custody aliens believed to be deportable. Statute further provides that alien may be detained or released on bond.

2. Regulation (8 C.F.R. 242.2(a)) allows district director to initially determine conditions of custody.

3. Regulation (8 C.F.R. 242.2(b)) permits alien to request that immigration judge redetermine custody conditions originally set by district director.

4. Regulation (8 C.F.R. 242.2(b)) permits custody determination by immigration judge to be appealed to Board of Immigration Appeals.

5. BIA has held that an alien generally should not be detained or required to post bond except on a finding that he is a threat to national security, or a poor bail risk. *Matter of Patei,* 15 I&N Dec. 666 (BIA 1976).

6. Statute (8 U.S.C. 1251(a)) provides that: "Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability." Court has employed "showing of clear abuse" standard of review. *Carlson v. Landon,* 342 U.S. 524, 540 (1952).

II. Asylum process

A. Statute (8 U.S.C. 1158(a)) provides that: "The Attorney General shall establish a procedure for an alien physically present in the United States



or at a land border or port of entry, irrespective of such alien's status, to apply for asylum. . . ."

B. Regulation (8 C.F.R. 208.3) provides that application for asylum may be filed with district director prior to commencement of exclusion or deportation hearing, and may also be filed or renewed before an immigration judge during exclusion or deportation proceedings.

C. Regulation (8 C.F.R. 208.7) requires district director to seek advisory opinion from Bureau of Human Rights and Humanitarian Affairs at State Department in all cases coming before him.

D. Regulation (8 C.F.R. 208.10) provides that exclusion or deportation hearing *shall* be adjourned for advisory opinion unless such opinion has already been obtained by the district director in connection with his adjudication. In the latter situation, the judge may request a new opinion if he believes that there has been a substantial change in circumstances.

E. Regulation (8 C.F.R. 208.9) provides that while asylum denial by the district director may not be appealed, the request may be renewed in exclusion or deportation proceedings before immigration judge.

III. Exclusion proceedings

A. Statute (8 U.S.C. 1225(b)) provides that, except for crewmen, national security cases, and stowaways, aliens believed to be inadmissible "shall be detained for further inquiry to be conducted

before a special inquiry officer [immigration judge]."

B. Statute (8 U.S.C. 1362) provides that any alien appearing in exclusion proceedings "shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

C. Statute (8 U.S.C. 1226(b)) provides that: "From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal."

D. By regulation, (8 C.F.R. 3.1(b)(1)) the Attorney General has authorized the Board of Immigration Appeals to hear exclusion appeals.

E. Regulation (8 C.F.R. 3.1(c)) provides that oral argument is available as a matter of right in all exclusion appeal cases.

F. Statute (8 U.S.C. 1105a(b)) provides that final orders of exclusion may be reviewed by petition for habeas corpus filed in a U.S. District Court.

IV. Deportation proceedings

A. Statute (8 U.S.C. 1252(b)) provides that, except for certain cases involving crewmen, a special inquiry officer (immigration judge) shall conduct proceedings to determine deportability of aliens in the United States.

B. Statute (8 U.S.C. 1362) provides right to retained counsel in deportation proceedings.



C. No statutory right to administrative appeal of deportation order.

D. Regulation (8 C.F.R. 3.1(b)(2)) authorizes the BIA to hear deportation appeals.

E. Regulations (8 C.F.R. 3.1(d)(1-a)); 8 C.F.R. 3.1(c) provide oral argument before Board as a matter of right on all but clearly frivolous deportation appeals.

F. Statute (8 U.S.C. 1105a(a)) provides that final orders of deportation may be reviewed directly in U.S. Courts of Appeals, and that the filing of a petition for review automatically stays deportation unless the court otherwise directs.

V. Administrative options for simplifying asylum, exclusion, and deportation process.

A. Eliminate jurisdiction of immigration judge and BIA to review custody determinations made by district director in deportation cases.

B. Change regulations to eliminate two-step asylum, exclusion, and deportation process.

1. Make either the district director or the immigration judge the sole decision maker in asylum cases.

2. Making district director the sole decision maker could be expected to re-raise the issues litigated in *Pierre v. United States,* 547 F.2d 1281 (5 Cir. 1977), vacated and remanded, 434 U.S. 962 (1977).

C. Eliminate mandatory requirement for advisory opinions from State Department

1. Could eliminate altogether (might be hard to defend).
2. Could use system of profiles with individual case referrals on a selective basis.

D. Exclusion appeals

1. Give more resources to BIA to devote to expediting appeals in exclusion cases.
2. Eliminate oral argument of right and make it discretionary, to be granted by Board only in those cases where there are significant legal issues to be explored.
3. Designate body other than BIA to hear exclusion appeals. (Unlikely to result in much benefit, since BIA has developed appellate expertise.)

E. Deportation appeals

1. Eliminate administrative appeal and let immigration judge decisions in deportation cases go directly to courts of appeals.
2. Restrict availability of oral argument on appeals from deportation cases.

F. Judicial review of deportation orders

1. Move to vacate automatic stays of deportation in more petition for review cases.
2. Attempt to get courts to impose sanctions on private attorneys who use judicial review process primarily for delay.



G. Administrative Procedures Act considerations

1. Any change in regulations which takes rights or privileges away from aliens will most likely require a 60 day notice and comment period, and a 30 day delayed effective date, *Sannau v. United States,* 460 F. Supp. 458 (S.D. Fla. 1978), unless "good cause" exemption contained in 5 U.S.C. 553(d) can be claimed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF FLORIDA

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Case No. 81-1260-Civ-EPS

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

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**AFFIDAVIT**

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

ROBERT E. JOCEAM, being duly sworn, deposes and says:

1. I am a member of Fried, Frank, Harris, Shriver & Jacobson, a law firm with offices in New York, Washington, D.C. and London, England, and am fully familiar with my firm's participation in this matter. I have been a partner in its litigation department since 1974.

2. From October of 1981, to the present, the firm has acted as special counsel to plaintiffs; throughout this time, its associates have worked under the supervision and guidance of lead counsel in Florida and myself.

3. This afidavit is submitted in support of a request for attorneys fees on behalf of the firm. This application contains no fee request for my services, however, and does not reflect any amount of my time in the hourly totals, although I supervised the associates' efforts closely,

**Calculation of Fee Request**

7. Both in my firm's immigration practice and in its practice generally, I have had extensive experience supervising teams of associates working on complex matters and under expedited trial and appellate schedules. As a billing partner, I regularly review attorney time submissions, estimate total productive time (including by reducing billable hourly rates, if necessary), and bill fees and disbursements to reflect an appropriate professional fee and statement.

8. The firm of Fried, Frank has an exemplary record of *pro bono publico* service in which I am proud to participate and play a substantial role. In the last two years alone, for example, I supervised my firm's associates in the representation of the City of New York in tort claim defense in over 64 cases, including matters which were appealed to the highest court of New York. In connection with immigration and refugee matters in this time period, my firm acted as counsel for the Lawyers Committee for International Human Rights and the U.S. Helsinki Watch Committee, who appeared *amicus curiae* in *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), a case affecting the unlawful detention of Cuban refugees. In that matter, the 10th Circuit ordered the detained plaintiff released after more than one year's imprisonment, concluding that continued detention by the Goverment was unlawful. I presently serve as the firm's coordinator for acceptance and prosecution of cases in the *pro bono* program of the United States District Court for the Southern District of New York, under which attorneys are assigned to handle matters involving Social Security claimants, employment discrimination and prisoner complaints, among others. Among other matters handled *pro bono* within the New York office during the past year, appropriate to note here, are two major civil rights cases in



the United States Supreme Court, two death penalty appeal and pardon review board cases in the Florida courts, and a substantial contribution of unreimbursed professional time to the Special Prosecutor's investigation concerning Secretary of Labor Raymond Donovan.

9. Where the client for whom the firm is acting has rights under law to recompense of disbursements or to an award of legal fees, it is my firm's practice to seek such recompense and fees. In some matters, it is willing to forego making an application or to waive its rights. In this matter, our submission as originally made reflected a substantial reduction in our out-of-pocket costs and recorded time equivalents, with the objective of avoiding a dispute over the details of our service. While we appreciated the entitlement, we were surprised that they would question the factual basis upon which the reimbursements requests were computed. We regret further the burden to which we, the Court and other counsel need now be put in providing substantial documentation, especially given the Government's failure to seek discovery, but are pleased, in view of the government's insistence, to do so. Moreover, the award of the amount requested, which represents only a portion of the firm's actual involvement in the litigation effort, would enhance the firm's ability to extend our effectiveness on behalf of those who cannot pay for our legal services.

10. Based upon my consideration of associates' productivity and with a view toward the firm's commitment to *pro bono* service, I endeavored to establish an appropriate fee request for our participation in this matter, which I approximated at $82,000. In light of the government's opposition to this very reasonably estimate, I believe the firm's entitlement to a fee award should be measured from the standpoint of all billable time spent. Accordingly, I have attached the documentation of all productive hours

spent by associates, law clerks and paralegals at the firm, from which I had derived the original fee request. These hours reflect participation in the litigation from the point of the defendant's motion to dismiss through the denial of the appellate stay. At our customary billing rates, detailed below with respect to each team member, the firm would receive $131,661.50 for these services.

11. In addition, my firm has applied for an award of $20,336, representing costs advanced in this matter, details of which have been set forth in connection with plaintiffs' original motion papers.

12. I have reviewed firm records concerning time and disbursements and hereby attest to the accuracy of the attached itemizations (Juceam Exhibits A through E).

**The Fried, Frank Participants**

13. Christopher Keith Hall, Esq., a 1978 graduate of the University of Chicago Law School, was associated with the firm from September 1978 through May 1982. At present, he is employed as an instructor at the University of Miami School of Law, in the fields of legal writing and human rights law. At the times in question in firm's customary billable rate for Mr. Hall was $105 per hour. Thus, for the 483.5 hours for which specific documentation is now submitted, the firm would have billed in excess of $50,000. (Affidavit Exhibit A) But these dollars alone do not reflect the full investment made by the firm in this litigation by virtue of Mr. Hall's work. During the period involved in this motion, there were times when Mr. Hall worked virtually full time, to the exclusion of any billable assignments. The firm, at lead counsel's request, sent Mr. Hall to Miami for a two-week period to assist in trial preparation. Moreover, because of Mr. Hall's seniority within the firm's associates, as well as his breadth of knowledge of the relevant areas of law, I was able to en-



trust to him much of the day-to-day coordination of associate responsibilities, as well as a good deal of the supervision and editorial work. I worked closely with Mr. Hall and am satisfied that his direction of the associates' efforts contributed to overall efficiency of time and quality of product.

14. Two junior associates also worked on various aspects of this litigtion on a virtually full-time basis: Terrence A. Corrigan, Esq., a (January) 1981 graduate of Columbia University School of Law, and Mary B. Gilmore, Esq., a 1981 graduate of the University of Miami School of Law. At Mr. Corrigan's customary billable rate of $90 per hour and Ms. Gilmore's rate of $85 per hour, the firm would have billed in excess of $35,000 for their respective 165.6 and 266.6 documented hours on this matter. (Affidavit Exhibits B and C).

15. Several other attorneys worked on various aspects of the district court proceedings. In alphabetical order these associates include, with seniority and billable rates indicated: Irwin Blum, Esq., Columbia University School of Law (1977) $105 per hour; Robin A. Fleischner, Esq., New York School of Law (1980) $90 per hour; Anne Golden, Esq., Rutgers University School of Law (1978) $105 per hour; Nancy Schnell, Esq., New York School of Law (1979) $100 per hour; Marla G. Simpson, Esq., University of Michigan School of Law (1978) $105 per hour; Jeffrey Susskind, Esq., University of Michigan School of Law (1979) $100 per hour; Debra M. Torres, Esq., Yale University School of Law (1981) $85 per hour; Merrie F. Witkin, Esq., Harvard University School of Law (1979) $100 per hour. At the applicable billing rates for these individuals, the firm would have billed in excess of $27,000. (Affidavit Exhibit D).

16. Finally, mindful of the importance of limiting costs without impairing quality of representation, the firm

asigned various tasks in this matter to its paralegals, law clerks and summer associates, whose 350-plus hours would have been customarily billed at $40.00-$50.00 per hour. (Affidavit Exhibit E). I believe that this time as well is properly includable in plaintiffs' attorneys fees request.

**Conclusion**

17. In deriving the firm's attorneys fees request for the purposes of this motion, I made reference to my own time records (not herein listed) and to the above-described documentation of well-over 1,500 productive hours by associates, paralegals and law clerks. A comparison between the $82,000 request and the actual firm recorded time detailed above reveals a $50,000 discount from the firm's ordinary rates and a discount of $40,000 from the $90 rate ceiling I arbitrarily employed in the request.

18. Should this Court determine that the firm's submission on this motion is premature insofar as it does include attorneys fees for the stay proceeding in the 11th Circuit (although it does not include the appeal on the merits), the $82,000 request is still lower than the amount calculable for the district court proceedings using *either* the firm's customary rates (approximately $96,000) or the arbitrary $90 rate ceiling (approximately $89,000).

19. Despite several extensions of time in which to do so, the Government has declined to seek discovery of time and disbursement records. Thus, for the Court's convenience we have supplied the attached exhibits and calculations.



20. For all of the above stated reasons, I believe that the number of hours listed were all reasonably, necessarily and justifiably incurred. Accordingly, attorneys fees and costs, in the amounts requested should be awarded pursuant to the Equal Access to Justice Act.

/s/ Robert E. Juceam
ROBERT E. JUCEAN

Sworn to before me this
5th day of November, 1982

/s/ BRAD ERIC SCHELER
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTICT OF FLORIDA

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CASE No. 81-1260-Civ-SPELLMAN

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN NELSON, ET AL., DEFENDANTS

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**MEMORANDUM OPINION AND ORDER ON ATTORNEYS' FEES, COSTS AND EXPENSES**

## INTRODUCTION

This matter is before the Court for a determination of the amount of attorneys' fees, costs and expenses to be paid by the government to Plaintiffs' counsel under the Equal Access to Justice Act [1] ("EAJA") and related statutes.[2] The Court has ruled, by separate order, that the Plaintiffs' counsel are entitled to such an award.[3] Thus, the only matter hwich must be resolved is the precise amount to be paid to counsel by the government.

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[1] 28 U.S.C. § 2412.

[2] 28 U.S.C. § 1920, 28 U.S.C. § 1961.

[3] *Jean v Nelson*, No. 81-1260 (S.D. Fla. Dec. 6, 1985) (order granting entitlement to attorneys' fees). Portions of said Order are reiterated herein; the Order in its entirety is attached hereto as an Appendix.



## I

## BACKGROUND

The last two decades have witnessed an influx of refugees into the United States, particularly the South Florida area, that has been perhaps unprecedented in what is considered peacetime.

The government's handling of refugees who arrived from Haiti, the poorest nation in the Western Hemisphere, came under fire in a series of lawsuits filed in the late 1970's and early 1980's. The bulk of these lawsuits were brought by attorneys and human rights activists who sought to protect the civil rights of the Haitian refugees. The litigation that arose from the alleged abuse of those rights was lengthy and bitter.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[4] In essence, the litigation had two primary goals. First, the Plaintiffs sought to stop the mass exclusion hearings which were being held without counsel. And second, Plaintiffs sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force the effect the prior policy of parole pending individual exclusion proceedings.[5]

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[4] The background to this litigation is discussed in *Louis v. Nelson*, 544 F. Supp. 973, 978-981 (S.D. Fla. 1982) and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455, 1464-1474 (11th Cir. 1983).

[5] The Complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of counsel or notice of the right to counsel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count II challenged the failure to advise

After a lengthy trial, this Court held that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and that the Plaintiffs' continued incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F. Supp. 973, 993-97 (S.D. Fla. 1982). Ten days later, this Court declared the new detention policy "null and void" as to the defined class, and ordered the release of its members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F. Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the Plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the Deendants stopped the accelerated mass exclusion hearings and class members were released from indefinite incarceration.[6] These results

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class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public exclusion hearing; Count VI challenged the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II, Count IV insofar as its alleged that Haitians in detention had first amendment rights of access to counsel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F. Supp. 811 (S.D. Fla. 1982).

[6] The relief obtained by the Plaintiffs mooted many of the issues raised in the Complaint. Plaintiffs were released from detention and indirectly obtained counsel or notice of the right to counsel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, Plaintiffs have had access to class members (Count IV). Also



were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the Defendant's appeal of this Court's decision on the APA issue, thus leaving the results Plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[7]

The results of this litigation were clearly overwhelming and important. To be sure, the Plaintiffs waited anxiously for the vindication of their rights; the attorneys, who brought this suit *pro bono publico*, have waited to be compensated for their efforts.

The Court has reviewed in detail hundreds of pages of affidavits in which counsel outlined their hours, costs and expenses, and their customary fees. Counsel calculated their fees under several theories, taking into account any reduction which the Court indicated it would make to reflect its finding that the position of the government concerning the equal protection issue was reasonable. In addition to having the affidavits before it for review, the Court

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as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. *See* 8 CFR § 212.5 (1985).

[7] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the Plaintiff class in the enforcement of the new detention policy and that the Plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (en banc). The Supreme Court held that the *en banc* court should not have eached the constitutional issue because under the statutes and regulations now in effect, parole decision must be made without regard to race or national origin. *Jean v. Nelson*, 105 S.Ct. at 2998.

## III

## THE STANDARD

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Supreme Court advised that "[t]he most useful starting point in determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." The resulting product is called the "lodestar". Obviously, determining how many hours are "reasonably" expended and what constitutes a "reasonable" hourly rate require a thorough analysis of many factors. Most of these factors are identified in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), and must be applied to cases arising under the EAJA in this Circuit. *Florida Suncoast Villas, Inc. v. United States*, 776 F.2d 974, 975 (11th Cir. 1985). The *Johnson* factors are not exhaustive.

In calculating their hours, "[c]ounsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission." *Hensley*, 461 U.S. at 434.

Once the "lodestar" figure has been ascertained, the Court can then reduce the award if the plaintiff has not prevailed on a claim, even where the "claim were interrelated, nonfrivolous, and raised in good faith." *Id.* at 436. However, rather than try and parse out the losing claims, the Court must examine the results achieved as a whole. *Id.* at 435.

On the other side of the coin, an award can be enhanced in cases of "exceptional success." *Id.* 435.

In the instant case, the Court has already found that the Plaintiffs were the prevailing party for purposes of awarding them attorneys' fees and other expenses under the EAJA. The Court further found that the government's

position on the Administrative Procedures Act ("APA") issue was not substantially justified, but that any award would be adjusted downward to reflect the fact that the government's position was not unreasonable as to the equal protection claim. The Court observed, however, that "there was considerable overlap between theAPA and the equal protection claim." (Appendix, p. 12).

Additionally, the Court noted that "[b]ecause the litigation before the Supreme Court concerned only the equal protection claim the Plaintiffs are not entitled to compensation under the EAJA for their efforts in that Court." (Appendix, p. 14, n.8). The possibility of partially compensating the Plaintiffs for those efforts was not entirely ruled out, since the government's change in position concerning their argument on whether nationality could be a factor in determining whether an alien could be paroled may have unecessarily prolonged the litigation.

Thus, the Court must ascertain what the "lodestar" figures are for the various attorneys claiming awards, adjust that figure downward if necessary, based on the failure of certain claims or for any other reason the Court finds necessary. The Court can then make any upward adjustment to indicate the exceptional results achieved by counsel, or any other factor that would make such an adjustment fair.

## IV
## THE JOHNSON FACTORS

The Court will begin its analysis by examining the facts of this case under the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Ci. 1974). Such an analysis will provide the basis for the "lodestar" figure.[8]

[8] The twelve factors are:
(1) the time and labor required;
(2) the novelty and difficulty of the questions;



A. The time and labor required.

This lawsuit was commenced more than five years ago. The class action suit involved numerous plaintiffs. The record in this case contains over 600 docket entries. Clearly, this was not your garden variety lawsuit.

The time spent by counsel on this lawsuit is listed earlier in this Order. The Court points out that the attorneys have already reduced their hours to reflect the hours spent on the equal protection claim and the time spent at the Supreme Court level. Thus, the hours spent by counsel for which they seek compensation are considerably lower than those listed on page 4 of this Order.[9] The revised schedule of hours, as prepared by counsel, reads as follows:

| *Attorney* | *Total Hours* | *(E.P. Hours)* | *(60% S.Ct.)* | *Reimbursable Hours* |
|---|---|---|---|---|
| I. Kurzban | 2,172.5 | ( 66.4) | ( 268.17) | 1,837.93 |
| I. Stotzky | 1,194.85 | ( 15.0) | ( 276.00) | 903.85 |
| B. Winick | 1,476.75 | ( 23.0) | ( 153.48) | 1,300.27 |
| V. Weisz | 628.2 | ( 0 ) | ( 0 ) | 628.2 |
| C. Hall | 97.8 | ( 0 ) | ( 0 ) | 97.8 |
| M. Rosen | 620.0 | ( 0 ) | ( 46.2 ) | 573.8 |
| Wald, Harkrader | 62.75 | ( 0 ) | ( 0 ) | 62.75 |
| Fried, Frank | 3,821.0 (Atty) | (363.0) | ( 674.4 ) | 2,783.6 |
| | 1,188.1 (Para) | ( 0 ) | ( 186.06) | 1,002.04 |
| TOTALS | 11,261.95 | (467.4) | (1,604.31) | 9,190.24 |

(3) the skill requisite to perform the legal service properly;
(4) the preclusion of other employment by the attorney due to acceptance of the case;
(5) the customary fee;
(6) whether the fee is fixed or contingent;
(7) time limitations imposed by the client or the circumstances;
(8) the amount involved and the results obtained;
(9) the experience reputation and ability of the attorneys;
(10) the "undesirability" of the case;
(11) the nature and length of the professional relationship with the client; and
(12) awards in similar cases.

[9] This table reflects the figures proposed by Plaintiffs' counsel. As will become apparent, the figures will be revised by the Court.

Several factors added to the volume of hours spent in litigating this case. First, local counsel had to confer with out-of-state counsel on virtually every step taken. The local attorneys, Ira Kurzban, Irwin Stotzky, Bruce Winick, Vera Weisz, Michael Rosen, and for a certain period of time Christopher Keith Hall, had to maintain constant contact with co-counsel in New York, Robert Juceam and his law firm Fried, Frank, Harris, Shriver & Jacobson, and at the initial phases, the Washington law firm of Wald, Harkrader & Ross. naturally, having counsel located in more than one place adds to the number of hours required to prosecute a case, but there is certainly no prohibition against having local and out-of-state counsel work on one lawsuit; it is quite common.

Second, the Plaintiffs faced a formidable foe. The government had, at one time or another, thirty different attorneys working on the case. Naturally, the Plaintiffs had to respond in kind with their own forces.

Third, the government took an unusually unwaivering position throughout the litigation. This is not meant to be critical of the government, but "[t]he government's contentious litigation strategy the plaintiff[s] to respond in kind. The government cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the plaintiff[s] in response." *Copeland v. Marshall*, 641 F.2d 880, (D.C. Cir 1980) (en banc) (footnote omitted).

Fourth and last, as the Court mentioned in its December 6, 1985 Order, the government's change in position regarding the Plaintiffs' claim that the government did in fact have a detention policy that was instituted *ultra vires* of the APA, served simply to prolong the litigation unnecessarily.

In short, having first hand knowledge of the demands of this case, the intensity and length of the pleadings, briefing



and argument and the time schedules involved, the Court is in the perhaps unenviable position of knowing that the time spent by Plaintiffs' counsel in the prosecution of this case has been reasonable and well supported by the record.

**B. The novelty and difficulty of the questions.**

There can be little serious dispute but that this has been a novel and complex case. Mere volume does not necessarily indicate complexity, but in the instant case, the size of the record and the passage of time do signify what has been the product of extreme complexity and difficulty. The appellate court does not differ with this view. *Jean v. Nelson*, 711 F.2d 1455, 1462 (11th Cir. 1983).

**C. The skill requisite to perform the legal services properly and the experience, reputation and ability of the attorneys.**

The Court finds that these factors must be considered together, rather than separately as they are listed in *Johnson*. These factors are intertwined, and must be discussed in context. each attorney or firm will be addressed individually so that their particular role in this case will be given fair credit.[10]

**Ira J. Kurzban**

Ira J. Kurzban's abilities and dedication as an immigration lawyer and champion of the public interest are nationally renowned. he has been identified by the *National Law Journal* as one of this country's twenty leading immigration law experts and has been described as "an extremely capable lawyer of widely recognized legal skill and

[10] Portions of the biographical description of counsel are taken from the Plaintiffs' Proposed Findings of Fact and Conclussions of Law.

dedication to the poor and disadvantaged," *Haitian refugee Center, Inc. v. Smith*, Case No. 79-206-CIV-JLK, slip op. at 13 (S.D. Fla. May 24, 1984).

As counsel for the National Council of Churches of Christ in the United Statse and the National Emergency Civil Liberties Foundation, he has litigated and been counsel of record in every class action lawsuit brought on behalf of Haitian refugees in the Southern District of Florida.

He has received local and national recognition and numerous awards for his work. for example, Mr. Kurzban was the first recipient of the Tobias Simon Pro Bono Service Award. This award is given by the Florida Supreme Court; Mr. Kurzban received the award on April 18, 1982. Also in 1982, Mr. Kurzban was recognized by *American Lawyer Magazine* as being one of the most prominent *pro bono* attorneys in the nation. *Esquire* magazine included Mr. Kurzban in a story on new stars to watch. In a special edition of *Newsweek* magazine entitled "Sweet Land of Liberty," Mr. Kurzban was hailed as one of the "New American Heroes." Perhaps one of the achievements of which Mr. Kurzban should be most proud, centers around his creation of and involvement with a student and alumni run *pro bono* program at the University of California at Berkeley Law School.

In addition to his litigation experience with respect to immigration law and international law, he is a nationally recognized expert in many of the areas of law involved in this case, including political asylum, refugee status, and immigration litigation, and has lectures and published extensively in these areas in respected journals and before sophisticated audiences.

He has taught immigration law, immigration litigation, civil rights, and civil liberties litigation, and has appeared



before Congressional Committes on matters concerning immigration legislation.

In sum, when the words "immigration attorney" are uttered, there is little doubt but that name Ira Kurzban springs to mind.

**Fried, Frank**

Fried, Frank is a fine law firm with a strong commitment to public interest litigation ad has a very high reputation. Despite local counsel's pleas, Fried, Frank, Harris, Shriver & Jacobson was virtually the only firm in the country possessing the requisite resources and experience in both immigration and federal litigation that was willing to participate in this lawsuit without immediate compensation.

Fried, Frank's reputation was attested to by the government itself at the hearing on the issue of attorneys fees: "We would state that with regard to Mr. Juceam's firm, that we have the highest regard for that firm in the Department of Justice. . . ."

Fried, Frank regularly participates exyensively in *pro bono publico* practice, for causes liberal and conservative, in support of and in opposition to governmental positions and policy, including immigration and refugee matters.

At any given time, Fried, Frank had numerous attorneys working on the instant case. This is not unusual at a large firm. Rather than list the attorneys and their achievements, since only their names were put into evidence, the Court will only take notice that the law firm as a whole enjoys a sterling reputation.

Robert E. Juceam, the partner at Fried, frank who organized and supervised its participation in this case, is an attorney of outstanding ability and reputation, as is reflected in the testimony of his colleagues. The Court

points out that Mr. Juceam is not seeking any compensation for himself at all despite the fact that he spent untold hundred of hours working on this case. Mr. Juceam's selflessness and generosity merit special mention by the Court and set an example for all of us.

Mr. Juceam is held in awesome esteem among immigration practitioners even though immigration law is not his exclusive field of practice.

Mr. Juceam's practice has included, on a regular basis, substantial general federal court and agency litigation, in addition to the representation of aliens in the United States and abroad, and of companies seeking to engage aliens for unemployment in the United States.

A past president of the American Immigration Lawyers Association, Mr. Juceam has also served as the organization's vice president, secretary, liaison committee member to the U.S. Department of State and of the Immigration and Naturalization Service and on its Board of Governors. He has lectured extensively on immigration law and refugee policy, and has testified before Congressional committees and subcommittees concerning proposed immigration legislation.

**Bruce J. Winick**

Bruce J. Winick is a tenured full professor at the University of Miami School of Law. He has taught Administrative law, Federal Civil Procedure, and Federal Jurisdiction. He is an outstanding scholar and a dedicated teacher.

Professor Winick has been employed as an associate at a large law firm in New York City, by the City of New York in a number of administrative and legal capabilities, and by the American Civil Liberties Union of Florida as its General Counsel.



Professional Winick is a nationally recognized expert on many of the legal issues raised by Plaintiffs' claims. He has published extensively on administrative law matters, and on judicial review of agency action in particular.

Professional Winick has extensive litigation experience in state and federal courts, incliding federal lawsuits involving judicial review of administrative action and also has extensive experience as a consultant to law firms and public litigation groups on the constitutional aspects of administrative law and special procedural issues involved in litigation against the government.

As a result of this experience, Professor Winick is a national expert in the ares of judicial review of agency action, the procedural complexities of litigation against the government, the constitutional subjects of due process and equal protection, and immigration law.

Professor Winick is also an expert in the use of statistics in judicial proceedings and his work in this area was crucial to development of Plaintiffs' discrimination claim.

**Irwin P. Stotzky**

Irwin P. Stotzky is a tenured full professor at the University of Miami Law School and his reputation is a very high one in this community. Professor Stotzky was instrumental in assisting the great late Soia Mentschikoff, former Dean of the University of Miami School of Law, in elevating the status of the law school to one of the nation's leading institutions.

Professor Stotzky has taught, among other courses, constitutional law, criminal law and constitutional criminal procedure, legal skills and jurisprudence, and immigration law. He has published, lectured and consulted extensively in these areas, and in particular in the area of constitutional aspects of immigration litigation.

Professor Stotzky has been involved in litigation in federal and state courts that raised constitutional questions that played an important part in this lawsuit. He consulted or worked directly on several other Haitian cases, playing an important role in litigation of the constitutional claims in these cases.

As a result of this experience, he is recognized as a national expert on the First Amendment, the constituional subjects of due process and equal protection, international law and immigration law. His expertise was invaluable to the presentation of Plaintiffs' constitutional claims.

**Michael J. Rosen**

Michael J. Rosen is an outstanding young attorneys who enjoys an excellent reputation in the Southern District of Florida.

Mr. Rosen's practice consists almost exclusively of federal criminal litigation. Prior to joining Rosen & Rosen, a Miami frim, he gained hundreds of hours of trial experience as an attorney with the Federal Public Defender's office in the Southern District of Florida.

Mr. Rosen is a member of the Federal Bar Association and was chairperson of the committee for redrafting the Standing Discovery Order entered in all federal criminal cases in the Southern District of Florida.

As the only attorney ready to assist full-time in preparation and conduct of the lengthy trial of Plaintiffs' claims, Mr. Rosen's expertise in federal trial practice was invaluable.

**Vera Weisz**

Vera Weisz has extensive experience in representation of Haitian refugees. During the course of her employment at Florida Rural Legal Services, Inc. in Belle Glade, Florida,



and then at the Haitian Refugee Center, Inc., in Miami, Florida, she has been involved in the representation of over one thousend Hiatian refugees seeking asylum in the United States, has represented over five hundred clients at exclusion proceedings, deportation, and asylum proceedings, and has participated in three major federal lawsuits related to the rights of Hiatian refguees. Ms. Weisz has lectured, conducted training seminars, and published on asylum law.

Ms. Weisz was one of the few attorneys in Miami who could speak fluently French and Creole, the languages used by most of the class members. Her experience in processing claims of Haitian refugees and her language abilities were crucial to her work in communicating with and preparing the testimony of Haitian plaintiffs and witnesses.

**Christopher K. Hall**

Christopher K. Hall has extensive experience in the area of international and immigration law. He has contributed his time to the Lawyers Committee of International Human Rights in connection with refugees and asylum applications and has taught international law, international human rights and international organizations at the University of Miami Law School.

He also has extensive litigation experience. he frequently argues in the Second Circuit and the New York State Court of Appeals and intermediate appellate courts and has worked on three Supreme Court cases.

Mr. Hall also worked as an associate at Kurzban, Kurzban & Weinger, P.A. and at the New York Attorney General's Office.

**Wald, Harkrader**

Two attorneys from the Washington, D.C. law firm of Wald, harkrader participated in the initial stages of the lawsuit and seek compensation for their services. These two attorneys, Mary Coombs and Mark Stern, also enjoy fine reputations in the legal community.

**D. The preclusion of other employment by the attorney due to the acceptance of the case.**

Ira Kurzban testified that this case caused him to turn down more lucrative work which would have benefitted his law firm's coffers. The demands of this case also caused a serious crimp in the scholarly work generally undertaken by members of academia, such as Professors Stotzky and Winick.

**E. Awards in similar xases.**

The Eleventh Circuit recently handed down a decision in which it affirmed the lower court's ward of attorneys' fees in a related case of up to $125.00 per hour. *Haitian Refugee Center, Inc. v. Meese*, No. 84-5679, slip op. (11th Cir. June 24, 1986). In fact, the Eleventh Circuit made no mention whatsoever of any "cap" on awards given under the EAJA.

**F. The customery fee.**

There is nothing in the record to contradict the figures given by counsel at the hearing and throughout the documentation that state their customary fees. Those attorneys in academia adequately testified as to what their fees are when working on outside projects. The Court, however, that despite five days of hearings, the distinction between members of academia and private attorneys was



never raised. It seems somewhat inequitable that professors, who have no overhead expenses, can charge the same hourly rates as attorneys in private practice. Nonetheless, this distinction has not been addressed by the parties nor in case law, and will therefore not be addressed by this Court other than in passing.

With regard to Michael Rosen, the Court is of the opinion that, when Mr. Rosen's role in this case is compared to that of lead counsel, a reduction in his hourly rate is required. Thus, Mr. Rosen's hourly rate will be adjusted downward to $100.00.

**G. Whether the fee is fixed or contingent.**

The fees in this case were contingent on three factors: skill, luck and success. Had the Plaintiffs failed to attain the level of success they had, the attorneys involved would have to sustain a loss of several million dollars—not an easy thing for even the most lucrative practitioners. This contingency factor will be discussed later in this Order under the "special factor" analysis.

**H. Time limitations imposed by the client or the circumstances.**

The time pressures of this case were rather constant. They were imposed, in large part, by the Court, but were also due in part to the exigencies of the situation. The spectre of having human beings languishing in detention centers is not pleasant to anyone, and therefore action had to be taken quickly. The demands of this Court were overwhelming. In sum, the pace was rather hectic throughout the case.

**I. The "undesirability" of the case.**

There was uncontroverted evidence at the hearing that lead counsel received several letters which contained the

senders' distate with Mr. Kurzban's decision to participate in this case. Mr. Kurzban also lost some clients solely on account of his humanitarian stand in this case. The Court knows from first hand experience that this was not a popular case of the public's eye. The facts involved in this case brought out sincere and intense reactions from the community; some people were sympathetic with the Plaintiffs' plight, others were not shy about their lack of sympathy. Counsel, the Court and the Plaintiffs were exposed to the darker side of humanity on more than one occasion.

**J. The nature and length of the professional relationship with the client.**

This factor is not relevant to the analysis in this case.

**K. The amount involved and the results obtained.**

This factor is crucial in this case, and provides the basis for a fully compensatory award. For, as the Supreme Court stated in *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983): "[t]he result is what matters."

The Court will not attempt to summarize or speculate on what the ramifications of the Plaintiffs' success in this case have been. The Court already determined that the Plaintiffs prevailed on their claims, as a whole, and received the bulk of relief sought.

The government took issue with the record keeping of Plaintiffs' counsel. The Court finds this contentiousness to be mostly without merit. For five years the attorneys kept fairly accurate time sheets, setting forth the time spent and the nature of the work involved. Counsel were extensively cross-examined by the government, and all responded to the satisfaction of the Court that by and large, time sheets reflected contemporaneous record keeping. The Court has in its possession exhibits which include the time sheets



for counsel and finds any inadequacies in record keeping to be inconsequential.

## ADDITIONAL FACTORS

### A. Duplication

One of the most significant areas of concern expressed by the government involved its contention that counsel's efforts were duplicative and thus not compensable. The Court must disagree. It is not uncommon, nor should is be, that attorneys work in groups. In situations such as these, the court should:

> assess the possibility that reported hours include duplication by reviewing with particular care the number of lawyers present at hearings, depositions and other discovery proceedings, and by evaluating the roles played by the lawyers in the litigation generally. The court can look to how many lawyers the other side utilized in similar situations as an indication of the effort required. Because utilizing more than one lawyer may be reasonable in some situations, such as during settlement conferences or during trial, *we decline to require an automatic reduction of reported hours to adjust for multiple representation or potential duplication. Ramos v. Lamm*, 713 F.2d 546, 554 (10th Cir. 1983) (emphasis added).

Counsel has represented to the Court, and the Court can find no reason to cast aspersions on the representation, that counsel went through their time sheets countless times and purged them of any unnecessary duplication. Furthermore, it must be noted that lack of duplication is not the goal of efficient attorneys, *unreasonable* duplication is the goal. Thus, an award will be reduced "only if the attorneys

are *unreasonably* doing the *same* work." Johnson v. University College of University of Alabama in Birmingham, 706 F.2d 1205, 1208 (11th Cir. 1983) (emphasis in the original).

In the instant case, multiple attorneys for the Plaintiffs *and* the government participated at every stage of the litigation. This was not a one or two lawyer operation. each attorney had her or his own specialty or strength. After receiving a pleading, counsel had to review the document, confer with out-of-state counsel, plan their strategy, divvy up the work depending upon the nature of the task, conduct research, gather resources, and then meet as a group. Naturally, there was room for duplication. That fact, does not call for the conclusion that the duplication was unreasonable or that it taints the entire effort.

The Court finds that the work of counsel was not unreasonably duplicative, and that "[a]ll attorneys who contribute their services to a case may be awarded reasonable attorneys' fees." *Dowell v. City of Apopka*, 698 F.2d 1181, 1188 (11th Cir. 1983) (citation omitted).

**B. Unsuiccessful claims: Equal Protection and Supreme Court Arguments**

As the Court stated in its December 6, 1985 Order, it found it necessary to reduce Plaintiffs' counsel's hours to reflect the fact that the government was substantially justified in the stance it took in response to the equal protection claim. Additionally, since only the equal protection claim was argued at the Supreme Court level, this Court found it inappropriate to grant an award to counsel for its efforts at that level. Throughout the proceedings at the district and appellate court levels, the government argued that nationality could not be a factor in determining whether an alien in paroled. In the Supreme Court,



the government changed its position and argued that the INS' rules and regulations prohibited the INS from making parole decisions based on nationally, but that under the Constitution, the INS was not prohibited from making such decisions. This Court finds that if the government has argued the position it took at the Supreme Court level, the constitutional claims would probably not have needed to the litigated. Thus, some award is in order for counsel's efforts in the Supreme Court.

As for the equal protection claim, counsel has delineated those hours which can be solely attributable to that issue and has excised them from their total hours. Counsel has also excised 60% of the time spent at the Supreme Court level. The Court finds both excisions are low, and thus rules that such time must be further reduced.

The Supreme Court observed in *Hensley*: "[t]here is no precise rule or firmula for making this determination. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Hensley*, 461 U.S. at 436-37. The Court finds that both options suggested by the Supreme Court are applicable to the case at bar.

Specific hours spent on the equal protection issue have been identified and eliminated from the total. As previously mentioned, the Court finds that counsel's estimate of time spent on the equal protection claims is too low. By the Court's estimate, forty per-cent (40%) of counsel's time was spent on clearly non-equal protection matters. Perhaps sixty per-cent (60%) of counsel's time was spent on interrelated matters; an insignificant portion of that time was spent exclusively on equal protection issues. Of the 60% of the time spent on commingled material, the Court estimates that approximately 25% of that time was

spent on equal protection issues. Thus, a reduction of 15% from the total number of hours is in order.

Those hours spent at the Supreme Court level shall be reduced by 75% rather than 60%. The Court will allow compensation for a fractional number of hours, because to do otherwise is simply not fair. The legal position of the government may have been substantially justified in the present of technical terms; the tactical position of the government, however, cannot claim the same status, and the Plaintiffs' counsel should not be penalized for the government's change in position concerning whether it had a detention policy or not.

In sum, the Court finds that its reduction of the hours spent on the equal protection claims is more appropriate than counsel's estimates. Additionally, the Court, *sua sponte*, reduced counsel's total hours to reflect a 75% reduction in those hours spent at the Supreme Court level.

### C. Documentation

The last factor to consider in determining the lodestar figure is whether counsel adequately documented their time and hours so as to merit a fully compensatory award.

The government argues that attorneys are required to keep contemporaneous, almost perfect, records and time sheets or else suffer the consequences. Such a draconian approach is unnecessary and not supported by the case law. Rather, counsel must conscientiously keep records and time sheets which "should identify the general subject matter of his [her] time expenditures." *Hensley*, 461 U.S. at 424. There is no prohibition against reconstructing time sheets where contemporaneous records are not kept. *Ramos v. Lamm*, 713 F.2d 546, 553 n.2 (10th Cir. 1983).

Even where there are discrepancies in time records, no reduction in the award is mandatory. Where an attorney's



affidavit is not specific as to the nature of the work performed, but does provide the court with the general area of the subject matter, the court need not demand greater accuracy. *See Preston v. Heckler*, 596 F. Supp. 1158, 1161 (D. Alaska 1984).

In reviewing the affidavits, and having heard testimony on the matter, the Court finds it unnecessary to reduce, based on the government's allegation that counsel kept inadequate records, the total award or the number of hours for which counsel seeks compensation.

## VI

## COMPUTATION OF THE LODESTAR

After examining the factors above, the Court finds that the following schedule reflects the number of hours reasonably expended and a reasonable rate for each attorney or law firm:

| *Attorney* | *Hours* | *EP/S.CT* | *Total* | *Rate* | *Lodestar* |
|---|---|---|---|---|---|
| Kurzban | 2,172.5 | 335.21(S.Ct)<br>325.88(E.P.) | 1511.41 | $125.00 | $188,926.25 |
| Stotzky | 1,194.85 | 345.0 (S.Ct)<br>179.23(E.P.) | 670.62 | $125.00 | $83,827.50 |
| Winick | 1,476.75 | 191.85(S.Ct)<br>221.51(S.Ct) | 1063.39 | $125.00 | $132,923.75 |
| Weisz | 628.2 | -0- | 628.2 | $75.00 | $47,115.00 |
| Hall | 97.80 | -0- | 97.80 | $100.00 | $9,780.00 |
| Rosen | 620.00 | 57.75(S.Ct) | 562.25 | $100.00 | $56,225.00 |
| Ward, Harkrader | 62.75 | -0- | 62.75 | $75-85.00 | $4,973.00 |
| Fried | | | | | |
| (atty) | 3,821.00 | 843.0 (S.Ct) | 2404.9 | $50-175.0 | $270,551.25 |
| (para) | 1,188.10 | 232.58(S.Ct) | 955.52 | $40.00 | $38,220.80 |

## VII

## UPWARD ADJUSTMENT

Once the lodestar figure has been ascertained, the district court may adjust the fee upward if special factors are present. The Act states in pertinent part: "attorneys fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding involved, justifies a higher fee." 28 U.S.C. § 2412(d)(1)(C)(2)(A). *See also Hensley*, 461 U.S. at 436. Because the language of the act is suggestive rather than exhaustive, additional "special factors" which require an upward adjustment of a fee award have been recognized by the courts.

These factors include the following: exceptional success on the part of the prevailing party, *Hensley*, 461 U.S. at 435; the risk of loss faced by the plaintiffs, *LaDuke v. Nelson*, 762 F.2d 1318, 1333 (9th Cir. 1985) and a quality of work so high that it resulted in a level of success higher than would be reasonably expected at the rate charged, *Blum v. Stenson*, 465 U.S. 886 (1984).

In the instant case, the Court has already made its findings of fact under the lodestar analysis. Those findings support an upward adjustment under some of the special factors; additional examination supports an upward adjustment for the remaining special factors.

### A. Increase in the cost of living

Unlike many cases, the work done has been spread fairly evenly over the past five years, perhaps with the exception of 1986. Because of the inherently sporadic nature of the judicial system, work had to be done in spurts (to prepare for oral argument, briefing schedules, etc.). "By



specifying inflation as a 'special factor', Congress inducated its concern that lawyers receiving fees at different times obtain equivalent value." *Action on Smoking and Health*, 724 F.2d 211, 219. Thus, there is clear instruction from the language of the Act that counsel should have its award reflect an increase in the cost of living which results from a long delay in payment. *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc) (citation omitted). This language, however, pertains only to those awards which follow the statutory rate of $75 per hour. Here, counsel's reasonably hourly rate has already surpassed the statutory rate, and therefore the Court declines to adjust the hourly rates to take into consideration the ravages of inflation.

### B. Limited availability of counsel

There was substantial testimony that the Plaintiffs' counsel encountered a shameful amount of disinterest from the local legal community when counsel sought to gather forces for this lawsuit.[11]

As mentioned earlier, this was a complex case. Counsel had to have knowledge of many interwoven and discrete areas of the law. Additionally, any attorney who did become involved in this case has to do so at her or his own expense, since the possibility of being reimbursed for the work was remote. Finally, the Court heard undisputed testimony that despite counsel's best efforts, they were unable to attract local counsel that had the combination

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[11] As the Eleventh Circuit observed, "[e]fforts had been made by the INS to secure representation for the Haitians, especially *pro bono*, in the Miami area. The response it received is an ugly reflection on the commitment with which the bar meets its responsibility to make legal services available to the disadvantaged." *Haitian Refugee Center, Inc. v. Smith*, 676 F.2d 1023, 1031 n.16 (5th Cir. 1982).

of knowledge, financial capability, and dedication to take on the responsibilities that this case entailed.

Although the limited availability of counsel is one of the factors already considered under *Johnson*, the Court finds it a significant enough factor to require an upward adjustment of the lodestar figure.

### C. The risk of loss

This factor, too, is subsumed to a large extent under the *Johnson* factor addressing the contingency of the award. However, "Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to *an otherwise compensatory fee*". *Blum v. Stenson*, 465 U.S. 886, 902 (1984) (Brennan, J., concurring) (emphasis added). The Court reads this language to hold that in addition to tailoring an award to be compensatory, the district court may also make an upward adjustment of that fee to reflect the risk of loss faced by counsel. Accordingly, the Court makes an upward adjustment of the lodestar figure to compensate counsel for the risk of loss that loomed very darkly above them.

### D. The quality of the work

An upward adjustment is justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of the service rendered was superior to that one reasonably shoul expect in light of the hourly rates charged and that the success was 'exceptional.' " *Blum v. Stenson*, 465 U.S. 886, 899 (1984) (citation omitted).

In the instant case, the Court finds that not only is there record evidence that counsel performed at an unusually high level of skill for attorneys charging the rates they did,



but the Court also points out that additional credit must be given for having taken the case in the first place and *maintaining* the levels of dedication and quality for five years.

It is true that the quality of the work can be reflected in the number of the hours documented. *Id.* at 898. But, to apply this principle in a vacuum or to hold that the quality of the work is reflected solely by the number of billable hours would, in effect, hold the law and its practitioners to standards and rules that are more fitting for economists. it would be unfair to equate that degree of skill held by counsel with the swiftness with which she or he could perform the work. To do so only encourages shoddiness and haste, neither having a place in the legal world. Thus, the Court declines to find that the quality of the work put out by counsel is wholly reflected by the number of billable hours. Rather, the Court finds that based on its first hand knowledge of the quality of Plaintiffs' counsel's work, as evidenced by the record, the lodestar figure must be increased to acknowledge the unsurpassable quality of the work.[12]

### E. The results achieved.

The Supreme Court stated in *Hensley*, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." 461 U.S. at 435.[13]

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[12] For another court's view of the quality of the work performed by counsel, see *Haitian Refugee Center, Inc. v. Smith*, No. 79-2086 (S.D. Fla. May 24, 1984) (order granting motion for fees, costs and expenses).

[13] In its analysis of the provisions of 28 U.S.C. § 1988, the Supreme Court in *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983) noted.

Although the "results achieved" have already been discussed in arriving at the lodestar figure, the Court finds that the case at bar does constitute one of those rare cases where such "exceptionel success" has been achieved, an enhanced award is justified.

The purpose of most civil rights laws is very simple: "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valueo solely in monetary terms." *Riverside v. Rivera*, No. 85-224, slip op. at 11 (Sup. Ct. June 27, 1986). Thus, the law recognizes the crucial concept that a person's freedoms are just as vital and mandate as much protection as a person's pocketbook. But, in order to enlist an attorney's aid in ptotecting those rights, a plaintiff must be able to have some leverage – fee shifting statutes provide that leverage by permitting prevailing plaintiff's cousel to receive compensation under certain circumstances.

In the instant case, the Plaintiffs' civil rights have been vindicated – "as a direct result of this litigation, the defendants stopped the accererated mass exclusion hearings and class members were released from indefinite incarceration." (Appendix, p.4).

Additionally, the *pro bono publico* bar in this community and throughout the nation has been shaken to its roots; a more conscientious attitude toward the plight of the indigent and unpopular has been taken in recent years due to the publicity of this case, and the nation-wide efforts to obtain *pro bono* counsel. Surely this "result" is one which cannot be measured in monetary terms, but must be measured nonetheless.

Finally, Plaintiffs' counsel took the government to task here, and succeeded at prohibiting the government from pursuing a course of action contrary to our laws and the forces of human dignity. This litigation reinforced the concept that parole decisions must be made without regard



to race or national origin. *Jean v. Nelson*, ____ U.S. ____, 105 S.Ct. 2992, 2998 (1985).

Based on the brief summary of the results obtained by counsel after five years of intense and acrid litigation, the Court finds that an enhanced fee award is appropriate, and further finds that the lodestar figure should be increased to reflect the excellent results achieved.

## VIII

## CONCLUSION ON ATTORNEYS' FEES

In conclusion, the Court finds that a fifteen percent (15%) upward adjustment of the lodestar figure is proper after consideration of all special factors.

In light of the analysis above concerning the lodestar figure and the 15% upward adjustment thereof, the Court finds that the following chart represents the correct numbers and tabulations which constitute a fair and just attorneys' fees award in this case:

| *Attorney* | *Lodestar* | *15% Multiplier* | *Total Fee Award* |
|---|---|---|---|
| Kurzban | $188,926.25 | $28,338.94 | $217,265.19 |
| Stotzky | 83,827.50 | 12,574.13 | 96,401.63 |
| Winick | 132,923.75 | 19,938.56 | 152,862.31 |
| Weisz | 47,115.00 | 7,067.25 | 54,182.25 |
| Hall | 9,780.00 | 1,467.00 | 11,247.00 |
| Rosen | 56,225.00 | 8,433.75 | 64,658.75 |
| Wald | 4,973.00 | -0-[14] | 4,973.00 |
| Fried | 270,551.25 | 40,582.69 | 311,133.94 |
| | | | $950,944.87 |

## IX

## COSTS

The Plaintiffs' counsel requests reimbursement for costs and expenses in the following amounts:

| *Attorney* | §1920 | EAJA | Sup.Ct | Total less Sup.Ct. |
|---|---|---|---|---|
| HRC, Inc. | $47,204.82 | $39,081.25 | $9,059.31 | $77,226.76 |
| Fried | $39,951.34 | $56,374.26 | $13,964.34 | $82,361.26 |
| Winick | -0- | $1,372.90 | $1,206.01 | $166.89 |
| Wald | -0- | $499.82 | -0- | $499.82 |
| | | | | $160,254.73 |

There is clearly a lack of consistency among the courts when it comes to determining which items are recoverable as costs or expenses under 28 U.S.C. § 1920 or under 28 U.S.C. § 2412(d)(C)(2)(A) respectively.

Section 1920 of Title 28 states:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The above list is not exhaustive, however, of which items courts recognize as recoverable in cases brought under the EAJA.

That is so because the EAJA states in pertinent part in Section 2412(d)(C)(2)(A):

For the purposes of this subsection—



> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

Thus, the language of the EAJA illustrates that while the "costs" incurred by the party may be recoverable only under § 1920, "expenses" may be recoverable under § 2412(d)(C)(2)(A). The clear language of the latter section lists certain expenses as examples, not limitations. *Hoopa Valley Tribe*, 569 F. Supp. at 947.

Courts have interpreted the above statutory sections inconsistently. For example, in *Action on Smoking and Health v. C.A.B.*, 724 F.2d 211, 224 (D.C. Cir. 1984), the court did not allow compensation as expenses under the EAJA for taxi fares, filing, wrapping and postage, but did allow compensation for photocopying costs, citing to *NAACP v. Donovan*, 554 F. Supp. 715, 719D. D.C. 1982).

Another court allowed prevailing plaintiffs to recover their copying costs, but arbitrarily reduced the requested amount of 25¢ per page to 10¢. *Wolfe v. Wolfe*, 570 F. Supp. 826, 826 (D.S.C. 1983).

In the case *American Academy of Pediatrics v. Heckler*, 580 F. Supp. 436, 440 (D.D.C. 1984), the court went a step further. There, the court disallowed compensation under the EAJA for research costs and overhead, as well as transportation and filing. Furthermore, the court held that paralegal and law clerk time was only compensable at the actual cost of their salaries paid out by the law firm. This Court strongly disagrees with that position.

In a decision handed down the same day as *American Academy of Pediatrics*, the same court held that "to

award 'fees' for law clerk and paralegal time at hourly charges billed to clients would, in effect, be to compensate those firms for both overhead and profit." *Ashton v. Pierce*, 580 F. Supp. 440, 443 (D.D.C. 1984). Yet, the court did permit reimbursement for the salaries paid to the paralegals and law clerks. Insight into that court's somewhat jaundiced view of the EAJA is provided by the following passage:

> It is now accepted that lawyers who prevail in these cases may be entitled to be paid a reasonable fee for services which are still somewhat euphemistically referred to as "*pro bono*". Atorneys hope to receive and usually request massive fees which cover their time, overhead, out-of-pocket expenses and a handsome profit. Often the government is asked to pay for the "learning experiences" of coveys of junior associates and other assistants assigned to a case to break the tedium of everyday practice.

580 F. Supp. at 4544.

This Court finds the above harangue to be simply inapplicable to the instant case. If the court in *Ashton* had been privy to the workings of this case, it would have been crystal clear that any abuses inherent in our legal system are seldom found in the fee applications of dedicated lawyers who provided a vital service to our citizenry by offering, *without compensation*, to protect the rights of all persons. Congress perceived a need to offer the possibility of compensation to attorneys who are willing to take the government to task; but *only* when the government acts without substantial justification are the public coffers opened.

With regard to the compensability of paralegal and law clerk time, the Court finds that the analysis set forth in



*Hoopa Valley v. Watt*, 569 F. Supp. 943, 947 (N.D.Cal. 1983) to be more pursuasive. There, the court noted:

> [T]he lower rates sought for law clerk services are reasonable and should be compensated as part of attorney's fees because the use of such services is a cost-efficient component of the modern practice of law.

Although law clerk and paralegal services constitute a part of attorney's fees, there is no basis for applying any multiplier to the figures. Thus, the Court will compensate Plaintiffs' counsel for the work performed by their paralegals and law clerks pursuant to the rate schedule provided by counsel.

The Court agrees with the Plaintiffs' position that virtually all expenses and costs reasonably incurred are recoverable under either 28 U.S.C. § 1920 or the EAJA.

The Eleventh Circuit had made very explicit its opinion that "with the exception of routine office overhead normally incurred in case preparation, during the course of litigation, or as an aspect of settlement of the case may be taxed as costs under section 1988." *Dowdell c. City of Apopka, Florida*, 698 F.2d 1181, 1192 (11th Cir. 1983).[14] The court allowed reimbursement in that case for travel, telephone and postage, and cited with approval several cases which permitted recovery for additional costs and expenses, such as mileage, photocopying, food and lodging.

This Circuit is not alone in its position that costs and expenses are not limited to docket fees and the like. Rather, the Ninth Circuit recently permitted an award for costs of telephone calls, postage, air courier and attorney travel expenses on the ground, finding that similar costs are

[14] Because the attorneys from Wald, Harkrader were involved only in the preliminary stages of this litigation, the enhancement factors are not applicable to their efforts.

routinely awarded under other fee statutes, and thus should be awarded under the EAJA. *International Woodworkers of America, AFL–CIO, Local 3098 v. Donovan*, 769 F.2d 1388 (9th Cir. 1985). *See also Hoopa Valley Tribe v. Watt*, 569 F. Supp. 943 (N.D. Cal. 1983) (telephone and travel costs awardable as part of expenses since they would normally be billed to client).

As for the witness and expert witness fees, the Court is satisfied that the testimony provided by Messrs. Gitlow, and Bernsen at trial was necessary, as was the testimony of Messrs. Mailman and Rogow at the hearing on attorney's fees.

With regard to the claims for computer time, the Court finds that Lexis charges are dissimilar from typing in that lexis fees are paid entities outside the law firm and are also generally charged to the client. Computer charges should be allowable as expenses and this Court will so allow compensation for those expenses.

Finally, the Court opines that the record keeping practices of the claimants has been sufficiently accurate so that no deduction therefor is necessary. The Court also notes at this time that the HRC, Inc., being an organization that has neither the facilities not financial strength to employ a state of the art billing system did a pretty good job of record keeping in light of those limitations.

## X

### SOME DEDUCTIONS ARE NECESSARY

The Court can find no way to justify awarding compensation for secretarial overtime as either costs or expenses. secretarial work is part of the everyday activity of a law firm which constitutes its overhead. Secretarial salaries are paid to employees of the firm, and thus are not similar to those monies paid to persons outside the firm such as



process servers or witnesses. Furthermore, their salaries cannot be equated with costs, such as filing fees, or expenses such as postage or computer charges, which are similarly paid to entities outside of the law firm. Attorneys cannot be compensated for normal overhead expenses.

The Court finds no authority to support the inclusion of hours and subsequent charges related to secretarial overtime in the award. The chart outlining the costs and expenses awardable is thus amended to reflect the deduction as follows:

| *Attorney* | *§1920* | *EAJA* | *Overtime* | *S.Ct.* | *Total* |
|---|---|---|---|---|---|
| HRC | $47,204.82 | $39,081.25 | $633.40 | $9,059.31 | $76,563.36 |
| Fried | $39,951.34 | $56,374.26 | $14,752.60 | $13,964.34 | $74,939.26[15] |
| Winick | -0- | $1,372.90 | -0- | $1,206.01 | $166.89 |
| Wald | -0- | $499.82 | -0- | -0- | $499.82 |
| | | | | | $152,169.33 |

## XI

### CONCLUSION ON COSTS AND EXPENSES

In conclusion, the Court finds that the summary of costs and expenses framed above accurately reflects what the law of this Circuit requires. In order to give true vitality to the EAJA and its corrolating statutes, courts must not be parsimonious solely because the monies paid are removed from the public coffers. On the contrary, the law requires courts not to consider that prevailing plaintiffs are paid from public funds. *Copeland v. Marshall*, 641 F.2d 880, 894-96 (D.C. Cir. 1980).

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[15] This figure adds in the expert witness fee and costs and copying which add up to $7,330.60, said amount not being included in the Plaintiffs' Proposed Findings of fact and Conclusions of Law, and which the Court includes at this time.

XII

**FEES FOR FEES AND POST-JUDGMENT INTEREST**

In a recent case, the Eleventh Circuit held:

> [I]n this case of first impression for the Eleventh Circuit, we apply the general intent of the Act and decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified. *Haitian Refugee Center, Inc. v. Meese*, 791 F.2d 1489, 1550 (11th Cir. 1986).

Based on that clear enunciation of the law in this circuit, this Court directs the Plaintiffs' counsel to submit for the Court's review affidavits concerning the fees, costs and expenses incurred in pursuit of attorneys' fees. *See Volpe v. Heckler*, 610 F. Supp. 144 (S.D. Fla. 1985).

As for post-judgment interest, the EAJA was amended August 5, 1985 to included the following paragraph:

> (f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be determined under Section 1916(a) of this title, and shall run from the date of the award through the day before the date of the mandate or affirmance,

This statutory amendment overrules this circuit's previous ruling in *Arvin v. United States*, 742 F.2d 1301 (11th Cir. 1984) which held that the district court was without authority to award interest on EAJA attorney's fees awards. The amendment is self-explanatory and requires no further comment by the Court.



XIII

**CONCLUSION**

It is within the Court's discretion to ascertain what constitutes a reasonable award of attorney's fees, costs and expenses under the Equal Access to Justice Act. The Court must make sure that the Act's fees provisions are not used to create "windfalls" to counsel. But, at the same time, counsel must be fairly compensated for their efforts. The findings and conclusions above illustrate what this Court believes is a fair award

Based on the above and foregoing, it is hereby

ORDERED AND ADJUDGED that attorneys fees, costst and expenses are awarded to counsel as follows:

IRA KURZBAN is awarded $217,265.19 in attorney's fees;

IRWIN STOTZKY is awarded $96,401.63 in attorney's fees;

BRUCE WINICK is awarded $152,862.31 in attorney's fees and $166.89 in costs;

VERA WEISZ is awarded $54, 182.25 in attorney's fees;

CHRISTOPHER KEITH HALL is awarded $11,247.00 in attorney's fees;

MICHAEL ROSEN is awarded $64,658.75 in attorney's fees;

WALD, HARKRADER is awarded $4,973.00 in attorney's fees and $499.82 in costs and expenses;

FRIED, FRANK is awarded $311,133.94 in attorney's fees, $38,220.80 in paralegal and law clerk fees and $74,939.26 in costs and expenses; and

HAITIAN REFUGEE CENTER, INC. is awarded $76,563.36 in costs and expenses

DONE AND ORDERED in Chambers, at Miami, Florida the 29 day of Aug., 1986.

EUGENE P. SPELLMAN

EUGENE P. SPELLMAN
UNITED STATE DISTRICT
JUDGE



cc: Ira Kurzban, Esquire
Irwin Stotzky, Esquire
Bruce Winick, Esquire
Michael Rosen, Esquire
Vera Weisz, Esquire
Niels Frenzen, Esquire
Robert Juceam, Esquire
Wald, Harkrader
Michael Lindemenn, Esquire
Leon Kellner, U.S. Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

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**ORDER CONCERNING PLAINTIFFS' ENTITLEMENT TO ATTORNEYS' FEES, COSTS AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

THIS CAUSE came before the Court on the plaintiffs' Motion for Attorneys' Fees, Costs, and Expenses under the Equal Access to Justice Act. For the reasons detailed below, this Court finds that the plaintiffs are entitled to an award of attorneys' fees, costs, and expenses allocable to their efforts in litigating their claims before this Court and the United States Court of Appeals for the Eleventh Circuit. By separate Order, this Court shall schedule a hearing to determine the amount that shall be awarded.

The Equal Acess to Justice Act ("EAJA") provides that:

> a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A).



**APPENDIX**

Thus, in order to grant an award of attorneys' fees, this Court must find that the plaintiffs were the prevailing parties within the meaning of the Act, that the government's position was not substantially justified and that there are no other special circumstances that would make an award unjust. All of the requirements for an award of attorneys' fees have been met here.

**THE PLAINTIFFS WERE THE 'PREVAILING PARTIES'**

The Supreme Court has observed that "plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhardt,* ____ U.S. ____, 103 S.Ct. 1933, 1939 (1983), (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978)). There can be no doubt in this case that the plaintiffs succeeded on a significant issue.

This case began in response to implementation by the INS of a new policy of accelerated exclusion proceedings and detention without parole of all Haitian refugees.[1] In essence, the litigation had two primary goals. First, the plaintiffs sought to stop the mass exclusion hearings which were being held without councel.[2] And second, plaintiffs

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[1] The background to this litigation is discussed in this Court's opinion, *Louis v. Nelson*, 544 F.Supp. 973, 978-981 (S.D. Fla. 1982), and in the Eleventh Circuit's panel opinion, *Jean v. Nelson*, 711 F.2d 1455,1464-1474 (11th Cir. 1983).

[2] Indeed, shortly after this case was filed the government conceded that the exclusion orders entered at such hearings were invalid and therefore said orders were vacated. Thus, plaintiffs were the prevailing party on this aspect of the litigation and, in light of the government's action, its position was not substantially justified.

sought to obtain the release from detention of class members pending the determination of their political asylum applications, thereby restoring to full force and effect the prior policy of parole pending individual exclusion proceedings.[3]

After a lengthy trial, this Court hed that the new detention policy was adopted in violation of the Administrative Procedure Act ("APA") and that plaintiffs' continued incarceration pursuant to this policy was unlawful. *Louis v. Nelson*, 544 F.Supp. 973, 993-97 (S.D.Fla. 1982). Ten days later, this Court declared the new detention policy "null and void", and ordered the release of class members "forthwith" pursuant to a carefully drafted release plan. *Louis v. Nelson*, 544 F.Supp. 1004, 1006-07 (S.D. Fla. 1982). Thus, the plaintiffs effectively obtained both of the goals they set out to achieve. As a direct result of this litigation, the defendants stopped the accelerated mass

[3] The complaint, filed on June 16, 1981, asserted seven causes of action. Count I challenged the commencement of preliminary interviews for Haitian refugees without the presence of councel or notice of the right to councel; Count II challenged the legality of the new detention policy, which was not promulgated pursuant to the rule-making requirements of the APA; Count III challenged the failure to advise class members of their procedural rights at exclusion hearings; Count IV challenged the denial of access to counsel; Count V challenged the denial of public exclusion hearings; Count VI the denial of the right to apply for political asylum; and Count VII challenged the lawfulness of the new Haitian program in its entirety under the equal protection clause. In a Memorandum Opinion and Order dated February 24, 1982, this Court dismissed Counts I, III, V, and VI in their entirety and Counts IV and VII in part. It retained jurisdiction over Count II, Count IV insofar as it alleged that Haitians in detention had first amendment rights of access to councel and that the Haitian Refugee Center had a claim of access to those persons in detention; and Count VII insofar as it alleged that the detention policy was applied in a discriminatory fashion. *Louis v. Meissner*, 532 F.Supp. 881 (S.D. Fla. 1982).



exclusion hearings and class members were released from indefinite incarceration.[4] These results were affirmed by the Eleventh Circuit panel. *See Jean v. Nelson*, 711 F.2d 1455, 1510 n.63 (11th Cir. 1983). The *en banc* court dismissed the defendant's appeal of this Court's decision on the APA issue, thus leaving the results plaintiffs obtained undisturbed. *See Jean v. Nelson*, 727 F.2d 957, 962 (11th Cir. 1984), *aff'd in part*, 105 S.Ct. 2992 (1985).[5]

The fact that plaintiffs did not "prevail" on their claim that the new policy violated their fifth amendment rights to equal protection does not mean that they cannot be considered "prevailing parties" for attorneys' fees purposes.

[4] The relief obtained by the plaintiffs mooted many of the issues raised in the complaint. Plaintiffs were released from detention and indirectly obtained councel or notice of the right to councel, thereby ensuring that class members would have notice of their procedural rights at exclusion hearings (Count III), including the right to apply for political asylum (Count VI). As a result of this lawsuit, defendants stopped their practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I). With the release of class members, plaintiffs have had access to councel and councel have had access to class members (Count IV). Also as a direct result of this litigation, the INS promulgated new parole regulations which are facially neutral and which require parole decisions to be made without regard to race or nationality. See 8 CFR § 212.5 (1985).

[5] The Eleventh Circuit panel that originally heard this matter found that the defendants discriminated against the plaintiff class in the enforcement of the new detention policy and that plaintiffs were therefore denied equal protection. *Jean v. Nelson*, 711 F.2d at 1509. The Eleventh Circuit, sitting *en banc*, however, held that excludable aliens have no constitutional rights with respect to their applications for admission, asylum, or parole. *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984)(en banc). The Supreme Court held that the *en banc* court should not have reached the constitutional issue because under the statutes and regulations now in effect, parole decisions must be made without regard to race or national origin. *Jean v. Nelson*, 105 S.Ct. at 2998.

Plaintiffs need not prevail on every issue to be considered a prevailing party. For purposes of attorneys' fees, "[t]he result is what matters." *Hensley,* 103 S.Ct. at 1940. Plaintiffs merely pursued alternative litigation theories in attacking the INS' new detention policy.[6]

**THE GOVERNMENT'S POSITION ON THE APA ISSUE WAS NOT SUBSTANTIALLY JUSTIFIED**

The government has the burden of proving that its position "had a reasonable basis both in law and fact." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 6, U.S. Code Cong. & Admin. News 1098, p. 4989; S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979). The Eleventh Circuit has emphasized that the legislative history of the Equal Access to Justice Act requires "the government to make a *strong showing* to demonstrate that its action was reasonable." *S. & H. Riggers & Erectors, Inc. v. O.S.H.R.C.,* 672 F.2d 426, 430 (11th Cir. 1982) (citations omitted) (emphasis supplied by the court). *See also Environmental Defense Fund, Inc. v. Watt,* 722 F.2d 1081, 1085 (2d Cir. 1983). The government has not and, indeed, cannot make the requisite showing here.

On August 5, 1985, the Equal Access to Justice Act was amended with regard to the "position of the United States" when determining substantial justification. Under the amendment, which applies to pending cases, the government must not only show substantial justification with regard to its litigating position, but also "the action or

[6] This Court was well aware that after it found that the new policy was violative of the APA that "[t]echnically . . . [it] need not go further in order to resolve plaintiffs' other claims for relief." *Louis* , F.Supp. at 977. However, the Court chose to review the equal protection claim in the interests of "judical economy and fairness." *Id.* at 997-98.



failure to act by the agency upon which the civil action is based." Pub.L.No. 99-80, ¶ 2(c)(2)(d). Under the facts of this case, the distinction makes little difference. *See Ashburn v. United States,* 740 F.2d 846 n.1 (11th Cir. 1984) (noting that in a typical case there is no real difference between action of agency and litigation position). The INS made a determination that its new detention policy did not have to comply with the rulemaking requirements of the Administrative Procedure Act. When this was challenged in Court, attorneys from the United States Attorney's Office and the Department of Justice argued that the INS was correct. The position taken by the INS and the position taken by the government attorneys in defending the INS' actions were essentially the same. And these positions were unreasonable.

The INS was well aware prior to this litigation that the courts in this jurisdiction had consistently rejected INS' claim that the APA did not apply to changes of substantive policy regarding Haitian refugees. *National Council of Churches v. Egan,* No. 79-2959-Civ-HOEVELER, Slip. op. at 3 (S.D. Fla. Aug. 3, 1979) (preliminary injunction entered, not appealed); *Sannon v. United States,* 460 F.Supp. 458, 466-67 (S.D. Fla. 1978), *remanded to be vacated as moot,* 631 F.2d 104 (S.D. Fla. 1978).

Indeed as early as March 20, 1981, the INS Acting General Counsel wrote a memorandum summarizing the legal requirements applicable to the defendants' detention policy and mass exclusion hearings. Citing the *Sannon* case as authority, he advised the INS that "[a]ny change in regulations which takes rights or privileges away from aliens will most likely require a 60-day notice and comment period, and a 30-day delayed effective date. . ." Legal Memorandum by INS Acting General Counsel Paul Schmidt, Px94. But even though the INS was apparently

aware that it needed to comply with the APA, the defendants intentionally refused to do so. As this Court found:

> They admitted to the Court that they made a conscious decision not to promulgate a rule pursuant to the Administrative Procedure Act. The evidence shows that they never seriously undertook the difficult task of drafting a set of guidelines concerning which aliens would be placed in detention. Instead, INS issued general instructions to its field officers to start detaining excludable aliens who do not establish a prima facie claim for admission.

*Louis v. Nelson*, 544 F.Supp. at 981.

In light of prior precedent and the advice of counsel, INS' refusal to comply with the APA was not reasonable; nor was the position of the United States Attorney's Office in defending these actions by claiming that the change in policy was not a rule subject to the rulemaking requirements of the APA. This Court rejected the government's claims in its opinion, finding that the change in policy was "clearly" a rule subject to the rulemaking requirements of the APA. *Louis v. Nelson*, 544 F.Supp. at 997. The Eleventh Circuit found that defendants were not likely to succeed on this issue and denied their request for a stay. *Jean v. Nelson*, 683 F.2d 1311, 1312 (11th Cir. 1982). After hearing the case, the Eleventh Circuit panel completely rejected the government's arguments that the new policy was not a rule to which the APA rulemaking requirements applied and affirmed the decision of this Court. *Jean v. Nelson*, 711 F.2d at 1483.

The government's factual position in this litigation was also without merit. The defendants repeatedly denied that there was a new detention policy for Haitians, claiming that the district directors still had complete discretionary authority to parole individuals or, alternatively, that the



directors were merely enforcing the statute. *See also Jean v. Nelson*, 711 F.2d at 1469-1470 (discussing conflicting testimony at trial by Administration officials as to whether there was a policy change). It was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures. Since the plaintiffs had consistently maintained that there was a detention policy, the defendants' unreasonable factual position unnecessarily prolonged the litigation of this matter.

Finally, the defendants have not demonstarated any special circumstances which would make an award unjust. Indeed, considering the extraordinary efforts of plaintiffs' counsel and the excellent results they achieved, it would be unjust to deny an award of attorneys' fees.

**THE PROPER STANDARD**

The issue of attorneys' fees in this case is complicated, however, by the fact that the government's legal position—that the INS' actions did not violate the equal protection guarantee of the fifth amendment—must be considered reasonable in light of the fact that the Cleventh Circuit, sitting *en banc*, actually agreed with the government on this point. Even though the Supreme Court found that the circuit court should not have reached the constitutional issue, the government was certainly "justified" for EAJA purposes in defending against the claim that the INS' actions violated the equal protection guarantee.

In *Hensley*, the Supreme Court emphasized that counsel should not be penalized for pursuing, in good faith, alternative claims for relief.[7] Although the Court observed in a

---

[7] According to the Court:

> In [certain] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories.

footnote that the standard it set forth is "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,' " 103, S.Ct. at 1939 N.7, this Court is of the opinion that these principles must be modified to some degree for fee awards under the Equal Access to Justice Act. Unlike the Civil Rights Attorney's Fees Awards Act, which allows prevailing parties in suits brought under specified civil rights statutes to recover "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988, the Equal Access to Justice Act mandates the award of attorneys' fees *unless* "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Thus, under the Equal Access to Justice Act, a prevailing party in a suit against the government cannot be awarded fees when the government's position was reasonable.

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> Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expoended on the litigation.
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not sufficient reason for reducing a fee. The result is what matters.

*Hensley v. Eckerhart,* 103 S.Ct. at 1940 (citation and footnote omitted).



In *Matthews v. United States,* 713 F.2d 677 (11th Cir. 1983), the Eleventh Circuit articulated the standard to be used in an Equal Access to Justice Act claim when a plaintiff prevails in some but not all its claims against the United States. Adopting the approach of the Third Circuit in *Goldhaber v. Foley,* 698 F.2d 193,197 (3d Cir. 1983), the Court noted that neither the terms of the Act nor its legislative history addressed this situation. It therefore began its analysis by looking to the underlying purpose of the Equal Access to Justice Act. If found:

> The governing principle of the Act is that the "United States should pay those expenses which are incurred when the government presses unreasonable positions during litigation." The central purpose of the Act is "to eliminate any barrier to litigation challenging unreasonable government conduct presented by the specter of attorney's fees. . . . Because the Equal Access to Justice Act contemplates deterring only unreasonable positions," it would contravene the purposes of the Act to require the government to bear the expense of defending even its reasonable positions. Following the Third Circuit, we adopt the position "that the United States is only responsible for that portion of the expenses attributable to its unjustified positions."

713 F.2d at 683-684 (citations omitted).

Thus, when reviewing a claim for attorneys' fees under the EAJA, the Court must take into account not only the results obtained but also the reasonableness of the government's positions on each of the disputed claims. As discussed above, the Court finds that the government was not substantially justified in its position on the APA claim. By prevailing on this claim, the plaintiffs obtained virtually all the relief they requested, a factor that should weigh heavily in the determination of the fee award. On

the other hand, because the government did not act unreasonably in defending against the claim that the INS' actions violated the equal protection guarantee of the fifth amendment, any fee award must also be reduced accordingly.

The Supreme Court observed in *Hensley* that when a lawsuit involves a "common core of facts" or "related legal theories" as this case did, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide hours expended on a claim by claim basis." 103 S.Ct. at 1940. This observation is particularly apt here. Determining the amount of time spent on each claim would be particularly onerous in this case, given the interrelated nature of the facts and theories and the number of attorneys involved in the various aspects of the litigation. The Court notes that there was considerable overlap between the APA and the equal protection claim. The preliminary issues were essentially the some. For example, for both claims plaintiffs had to establish that they had standing, that this Court had subject matter jurisdiction, that they were entitled to preceed as a class, that a "final" INS order was not required, that they had exhausted administrative remedies, that the detention policy was not committed to agency discretion and that the political question doctrine did not apply.

Even at trial, the presentation of the equal protection issue overlapped to some degree with the APA claim. Defendants argued that there had not been a change in detention policy and that INS officials continued to have the same discretion to grant parole. Plaintiffs' Exhibit 1, for example, was offered to prove both that the defendants had a policy and that this policy discriminated against Haitians.

This Court does not think it is appropriate to further protract the matter by attempting to identify which



specific hours and expenses should be eliminated from a fee award because they are attributable to the equal protection claim and not the APA claim. Rather, one of the factors the Court will consider in determining the ultimate fee award in this case is that the government was not unreasonable in defending against the equal protection claim. Any award will be adjusted downward total attorney time that should be attributed to each claim can be approximated.

The Court will conduct a hearing to determine the total number of hours that can be considered "reasonably expended" on the litigation and an reasonable hourly rate for the attorneys involved. In addition to the downward adjustment discussed above, the Court will consider whether the fees should be enhanced for any reason pursuant to 28 U.S.C. 2412(d)(2), including th excellent results achieved by plaintiffs' counsel, the limited availability of qualified counsel for this kind of litigation, and the delay in payment of this award.[8]

---

[8] Because the litigation before the Supreme Court concerned only the equal protection claim, the paintiffs are no entitled to compensation under the EAFA for their efforts in that Court. However, the plaintiffs have pointed out that the government apparently changed its litigation position as the case progressed. Before the Supreme Court, the government argued that the INS was precluded by statute and regulations from making nationality-based distinctions. Based upon this representation, the Court found that it was unnecessary to reach the constitutional issues. At trial, however, the government argued to the contrary—that nationality can be a factor in determining whether an alien is paroled.

This Court recognizes that if the government had taken the position it now takes during the trial, the constitutional claims may not have needed to be litigated. The Court will therefore consider the government's apparent change in position in adjusting the final fee award.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of December, 1985.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
United States District Judge

Copies to all counsel of record.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-Spellman

LUCIEN LOÚIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

**SUBMISSION OF ATTORNEY'S FEES AFFIDAVITS PURSUANT TO COURT ORDER OF AUGUST 29, 1986**

The Plaintiffs, by an through their undersigned counsel, and pursuant to this Court's Order of August 29, 1986 submit the attached requests for attorney's fees, costs and expenses.

Respectfully submitted,

KURZBAN KURZBAN WEINGER & HOLTSBERG
Plaza 2650, Second Floor
2650 S.W. 27th Avenue
Miami, Florida 33133
(305) 444-0060

BY: IRA J. KURZBAN, ESQ.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by first class mail to Michael Lindemann, Esq. at Office of Immigration Litigation, 550 11th Street, N.W., Washington D.C. 20530, on this 8th day of September 1986.

IRA J. KURZBAN, ESQ.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

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**AFFIDAVIT OF IRA J. KURZBAN, ESQ. ON ATTORNEY'S FEES PURSUANT TO COURT ORDER OF AUGUST 29, 1986**

BEFORE ME, the undersigned authority appeared IRA J. KURZBAN, ESQ. who being duly sworn deposes and states that the following fees, expenses and costs were all reasonably and necessarily incurred in seeking attorney's fees in this action:

**I. *ATTORNEY'S FEES***

| | | |
|---|---|---|
| 8/1/85 | Reviewed Gov. Memo in Response to Plaintiffs' Supplemental Memo | .4 |
| 8/4/85 | Discussion with co-counsel re: response | .5 |
| 8/5/85 | Reviewed draft response and discussion with co-counsel | 1.25 |
| 8/30/85 | Plaintiffs' reliance on supp. authority | .6 |
| 9/13/85 | Plaintiffs' Second Notice of reliance | 1.3 |
| 12/9/85 | Reviewed Court's opinion | .8 |
| 1/15/86 | Reviewed documents for experts | 5.2 |
| 1/16/86 | Letter and documents to experts | 1. |
| 2/3/86 | Conversations with co-counsels | 1.4 |
| 2/4/86 | Reviewed Gov. Motion to Reconsider and began research | 7. |
| 2/5/86 | Continued research and drafted response | 14. |



| | | |
|---|---|---|
| 2/5/86 | Meeting w/ co-counsel to prepare hearing | 3. |
| 2/6/86 | Preparation and trial | 10. |
| 2/23/86 | Preparation for trial | 3. |
| 2/24/86 | Trial and preparation for next day | 10. |
| 2/25/86 | Trial and preparation for next day | 5. |
| 2/26/86 | Preparation and trial | 8. |
| 3/6/86 | Preparation for closing argument | 4. |
| 3/7/86 | Closing argument | 2. |
| 5/6/86 | Reviewed draft of Plaintiffs' finding of fact and conclusions of law | 3.5 |
| 5/12/86 | Reviewed Gov. findings of fact | 1.25 |
| 5/16/86 | Reviewed and commented on Plaintiffs' second draft of findings | 2.5 |
| 5/30/86 | Spoke with clerk | .25 |
| 6/28/86 | Re-read *HRC v. Smith* for submission | .5 |
| 6/30/86 | Filed Supp. Authority with analysis | 3.5 |
| 8/29/86 | Reviewed Court's Opinion | 1. |
| 8/31/86 | Drafted affidavit on fees | .75 |
| 9/1/86 | Drafted Motion to Clarify and Ct. Order | 3.8 |
| 9/2/86 | Discussions with co-counsel and review of motions and affidavits | 4.5 |
| 9/7/86 | Review of final draft and corrections | 3.2 |
| 9/8/86 | Review of final draft and submission | 1.8 |
| | | 105.0 |
| | | x$125/hr |
| | SUB-TOTAL | $13,125.00 |

**II. *COSTS***

| | | |
|---|---|---|
| A. | 28 USC § 1920(1) [Clerk/Marshall Fees] | $ 17.00 |
| B. | 28 USC § 1920(4) Copying Costs | 2,390.31 |
| | SUB-TOTAL | $2,407.31 |

### III. *EXPENSES*

| | | |
|---|---|---|
| A. | 28 USC § 2412(d)(1)(A) | |
| | Courier Service | $ 257.00 |
| | Telephone | 44.61 |
| | Miscellaneous (e.g. Parking) | 3.75 |
| | SUB-TOTAL | $ 301.36 |
| I. | ATTORNEY'S | $13,125.00 |
| II. | COSTS | 2,407.31 |
| III. | EXPENSES | 301.36 |
| | TOTAL | $15,833.67 |

IRA J. KURZBAN, ESQ.

Sworn to and Subscribed before me this 8th day of September, 1986.

NOTARY PUBLIC
State of Florida



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

**AFFIDAVIT OF BRUCE J. WINICK, ESQ. ON ATTORNEY'S FEES PURSUANT TO COURT ORDER OF AUGUST 29, 1986**

BEFORE ME, the undersigned authority appeared BRUCE J/ WINICK, ESQ., who being duly sworn deposes and states that the following fees, expenses and costs were all reasonably and necessarily incurred in seeking attorney's fees in this action:

### I. *ATTORNEY'S FEES*

| | | |
|---|---|---|
| 12/9/85 | Reviewed Court's opinion | 1.0 |
| 2/3/86 | Conversation with co-counsel | .5 |
| 2/5/86 | Meeting with co-counsel to prepare hearing | 3.0 |
| 2/6/86 | Preparation and hearing | 4.0 |
| 5/6/86 | Reviewed draft of plaintiffs' finding of fact and conclusions of law | 2.0 |
| 6/27/86 | Review *H.R.C. v. Smith* and conversation with co-counsel | 1.0 |
| 8/30/86 | Reviewed Court's opinion and meeting with Ira Kurzban | 1.0 |
| 9/1/86 | Reviewed and redrafted motion and proposed order | 1.0 |
| | TOTAL HOURS | 13.5 |
| | | x$ 125/hr |
| | TOTAL | $1,687.50 |

BRUCE J. WINICK, ESQ.

Sworn to before me this 2nd day of September, 1986.

NOTARY PUBLIC
State of Florida



**AFFIDAVIT OF IRWIN P. STOTZKY**

IRWIN P. STOTZKY, bring duly sworn, hereby deposes and says:

I have reasonably and necessarily expended the following hours, between February 3, 1986 and February 24, 1986, doing legal work in *Jean v. Nelson*:

| Date | Task | Hours |
|---|---|---|
| 2/3/86 | Phone conference with Ira Kurzban from New Haven, Connecticut | .5 |
| 2/4/86 | Preparation for Heaing | 2.0 |
| 2/5/86 | Conference in Miami with Ira Kurzban, Bruce Winick, Robert Juceum and Terry Corrigan re: preparation for hearing | 3.0 |
| 2/6/86 | Hearing on attorney's fees and costs | 8.0 |
| 2/23/86 | Preparation for Hearing | 2.0 |
| 2/24/86 | Hearing and testimony | 5.0 |
| | TOTAL HOURS | 20.5 |
| | Hourly rate: $125.00 per hour | |
| | Total Amount: | $2,562.50 |

Irwin P. Stotzky

Sworn to and subscribed before me this 1st day of September, 1986.

Notary Public – State of Florida

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

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**SUPPLEMENTAL AFFIDAVIT OF VERA A. WEISZ WITH REFERENCE TO ATTORNEYS' FEES AND COSTS**

I, VERA A. WEISZ, hereby declare:

1. I am an attorney admitted to the practice of law in the states of Florida and California. I was employed by the Haitian Refugee Center, Inc. in Miami, Florida at the time that I was involved in the litigation of the instant case. I am currently self-employed in my law practice at 3250 Wilshire Blvd. Suite 1604, Los Angeles, Californi, 90010.

2. I am submitting this supplemental affidavit setting forth the hours I have spent in 1986, to date, in presenting my claim for attorneys' fees and costs on behalf of the Haitian Refugee Center, Inc.

3. In February, 1986, I spent twenty-five (25) hours in travel, preparation, and testimony in this matter as set forth on the attached statement. My current billing rate is $100.00 per hour. Therefore, the total fee for my hours is $2,500.

4. My costs for airfare, flying roundtrip from Los Angeles to Miami and back were $319.00. I had additional travel costs for the sum of $39.62, bringing my total costs to a total of $358.62.



I declare under penalty of perjury that the foregoing is true and correct this 2nd day of September, 1986. at Los Angeles, California.

/s/ Vera A. Weisz
VERA A. WEISZ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

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**STATE OF NEW YORK** )
) ss:
**COUNTY OF NEW YORK** )

SANDRA M. LIPSMAN, being duly sworn, deposes and says:

1. I am an associate employed by Fried, Frank, Harris, Shriver & Jacobson, and am fully familiar with the firm's activities in connection with prosecution of the fee application in this matter.

2. I submit this affidavit in support of a request for attorneys' fees, costs and expenses incurred in prosecution of the fee application in this matter, pursuant to this Court's Order dated August 29, 1986.

3. Attached hereto as Exhibit A is an itemization of all productive hours spent by attorneys, paralegals, and law clerks at the firm in prosecution of the fee application. At the requested rates of $75.00 for attorneys and $40.00 for paralegals and law clerks, which rates are well below the firm's customary billing rates, the total fee requested is $58,103.75.

4. The firm also requests an award of $20,536.91, detailed in Exhibit B, representing costs and expenses advanced in connection with the firm's fee application.



5. For the convenience of the Court, attached hereto as Exhibit C is a summary of the fees, costs, and expenses requested pursuant to the Court's Order of August 29, 1986.

6. I have reviewed firm records concerning time and disbursements and prepared the attached itemizations from those records. I believe that the number of hours and the expenditure totals listed herein were properly computed and were reasonably, necessarily and justifiably incurred. Accordingly, all attorneys' fees, expenses and costs, in the amounts requested, should be awarded.

Sandra M. Lipsman

Sworn to before me this ____ day of September, 1986.

---

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-1260-Civ-Spellman

LUCIEN LOUIS, ET AL., PLAINTIFFS

*v.*

ALAN C. NELSON, ET AL., DEFENDANTS

**ORDER VACATING MEMORANDUM OPINION AND ORDER ON ATTORNEYS' FEES, COSTS AND EXPENSES**

This CAUSE comes before this Court on Plaintiffs' Motion for Amplification of Order for Entry of Judgment on Attorney's Fees, Costs and Expenses. In light of this motion and the accompanying memorandum which calls to this Court's attention the possibility of a fatal defect in the way in which the Court awarded attorney's fees, it is hereby

ORDERED AND ADJUDGED that this Court vacate and hold in abeyance its August 29, 1986 Court Order and Memorandum Opinion awarding attorney's fees until such time that it examines the circumstances and determines what measures, if any, this Court must take to correct the situation.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of Sept. 1986.

/s/ [SIGNATURE ILLEGIBLE]
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record



# Supreme Court of the United States

No. 89-601

COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

ORDER ALLOWING CERTIORARI. Filed January 22, 1990.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is granted.

January 22, 1990

U.S. GOVERNMENT PRINTING OFFICE: 1990 262-203 (80174)

Supreme Court, U.S.
FILED
MAR 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-601

# In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATIONALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

KENNETH W. STARR
*Solicitor General*
STUART M. GERSON
*Assistant Attorney General*
THOMAS W. MERRILL
*Deputy Solicitor General*
HARRIET S. SHAPIRO
*Assistant to the Solicitor General*
WILLIAM G. KANTER
MICHAEL JAY SINGER
MARY K. DOYLE
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether, in a case where the federal government is liable for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987), it must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

**PARTIES TO THE PROCEEDINGS**

Petitioners, who were defendants in the district court and appellants in the court of appeals, are the Commissioner of the Immigration and Naturalization Service (INS)*; the District Director of INS, District VI; the Assistant District Director for Deportation, INS, District VI; Officer in Charge, Krome Avenue North Detention Facility; the INS; and the Attorney General of the United States. Respondents, who were plaintiffs in the district court and appellees in the court of appeals, are Lucien Louis, Jean Louis Servebien, Pierre Silien, Serge Verdieu, Milfort Vilgard, and Joel Casimir, on behalf of themselves and all others similarly situated; and the Haitian Refugee Center, Inc.**

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* Gene McNary was confirmed as the commissioner of the Immigration and Naturalization Service on October 26, 1989. We have accordingly added his name to the title of this case.

** Marie Lucie Jean and Harold Jacques were named as petitioners in an earlier habeas corpus petition, but their names were not included in the second amended class action complaint.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-601

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATIONALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

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*ON WRIT OF CERTIORARI TO*
*THE UNITED STATES COURT OF APPEALS*
*FOR THE ELEVENTH CIRCUIT*

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**BRIEF FOR THE PETITIONERS**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at 863 F.2d 759. The opinion and order of the district court (Pet. App. 46a-99a) is reported at 646 F.Supp. 1300.

## JURISDICTION

The judgment of the court of appeals (Pet. App. 100a-101a) was entered on December 27, 1988. A petition for rehearing was denied on May 17, 1989 (Pet. App. 102a-103a). On August 10, 1989, Justice Kennedy extended the time for filing a petition for a writ of certiorari to September 14, 1989, and on September 12, 1989, he further extended it until October 14, 1989. The petition for a writ of certiorari was filed on October 13, 1989, and was

granted on January 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

The Equal Access to Justice Act, 28 U.S.C. 2412(d) (1982 & Supp. V 1987), provides in relevant part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
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> (2) For the purposes of this subsection—
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> (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that * * * (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);
>
> * * * * *



> (D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]

**STATEMENT**

1. Congress enacted the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d),[1] "to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2325. See S. Rep. No. 253, 96th Cong., 1st. Sess. 1, 5-6 (1979); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 5 (1980); H.R. Rep. No. 120, 99th Cong., 1st Sess. 4, 12 (1985). Unlike certain other attorney's fee statutes,[2] EAJA does not authorize automatic fee-shifting. Instead, it provides that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2(B)) if that party prevails in a civil non-tort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

2. This attorney's fee dispute arises out of a class action brought in 1981 by respondents, as representatives of certain Haitian aliens detained by the Immigration and

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[1] Unless the context indicates otherwise, all references to EAJA herein are to the current version, which appears in 28 U.S.C. Supp. V.

[2] For example, in *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983), this Court, in referring to 42 U.S.C. 1988, stated that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' S. Rep. No. 94-1011, p. 4 (1976) (quoting *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968))."

Naturalization Service,[3] to challenge a revised parole policy instituted by the INS in that year in response to an influx of undocumented excludable aliens from the Caribbean region. *Jean* v. *Nelson*, 472 U.S. 846, 848 (1985). Respondents' complaint, as amended, contained seven counts, each alleging a separate cause of action. Count 2 alleged that the new parole policy constituted a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and that the government's failure to follow APA rulemaking procedures rendered that policy unenforceable. The other counts alleged a number of other constitutional and procedural violations of respondents' rights.[4]

[3] The district court certified a class consisting of all Haitian aliens who arrived in the Southern District of Florida on or after May 20, 1981, who were applying for entry into the United States and who were presently in detention pending exclusion proceedings at various INS detention facilities, for whom an order of exclusion had not been entered and who were either: (1) unrepresented by counsel; or (2) represented by counsel pro bono publico assigned by the Haitian Refugee Volunteer Lawyer Task Force of the Dade County Bar Association. In its final judgment, the district court further modified the class certification by enlarging the class to include all detained Haitians for whom a counsel's notice of appearance form had been entered. *Louis* v. *Nelson*, 544 F. Supp. 1004, 1005, 1009 (S.D. Fla. 1982).

[4] Count 1 challenged the commencement of preliminary interviews of Haitian aliens without the presence of counsel or notice of the right to counsel; Count 3 challenged the failure to advise class members of their procedural rights at exclusion hearings; Count 4 (which rested, inter alia, on the First Amendment) challenged the denial of counsel; Count 5 challenged the denial of public exclusion hearings; Count 6 challenged the denial of the right to apply for political asylum; and Count 7 challenged the lawfulness of the program in its entirety under the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 90a; *Louis* v. *Meissner*, 532 F. Supp. 881, 883-884 (S.D. Fla. 1982).



Before trial, the district court dismissed on jurisdictional grounds all of respondents' claims except those based on the APA and the Fifth and First Amendments. *Louis* v. *Nelson*, 544 F. Supp. 973, 983 n.25 (S.D. Fla. 1982). After a five-week trial, the district court found respondents' constitutional claims to be without merit. *Id.* at 1001-1004. It ruled in favor of respondents on the APA claim, however, concluding that the revised parole policy should have been promulgated in accordance with notice-and-comment rulemaking procedures. *Id.* at 993-997.[5]

Petitioners appealed the district court's APA ruling. Respondents cross-appealed, pressing their equal protection and First Amendment claims, as well as the claims that had been dismissed before trial.

A panel of the Eleventh Circuit affirmed the district court's judgment with regard to the APA claim, but on a different rationale. The district court had relied (544 F. Supp. at 966-997) on criteria enunciated in *Brown Express, Inc.* v. *United States*, 607 F.2d 695, 701-702 (5th Cir. 1979), and *Pacific Gas & Electric Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974), in concluding that the INS policy did not fall within the "general statement of policy" exception to the APA notice and comment requirement for rulemaking. The panel disagreed with those cases, and enunciated a different theory supporting the conclusion that no "general statement of policy" was involved.[6] In all

[5] The court subsequently declared that the new policy was "null and void" and that the prior policy was restored to "full force and effect." *Louis* v. *Nelson*, 544 F. Supp. at 1006. Accordingly, the court ordered that all class members in detention be released on parole under an interim plan, subject to certain terms and conditions. *Id.* at 1006-1009.

[6] The court of appeals panel stated, however, that "[i]n all fairness to the district court, analyzing a rule within the general statement of policy exception is akin to wandering lost in a Serbonian Bog. The term itself • • • offers little guidance. • • • The legislative history

other respects, the appellate court reversed the district court's post-trial judgment; in addition, it concluded that several of the claims should not have been dismissed before trial and remanded the case for further factual development. *Jean* v. *Nelson*, 711 F.2d 1455 (11th Cir. 1983).

The panel opinion was vacated when rehearing en banc was granted. *Jean* v. *Nelson*, 714 F.2d 96 (11th Cir. 1983). The en banc court dismissed in part, reversed in part, and remanded with instructions. *Jean* v. *Nelson*, 727 F.2d 957 (11th Cir. 1984). All members of the en banc court agreed that the APA claim was moot because petitioners had, subsequent to the district court's decision, promulgated regulations in accordance with the APA, and because the only persons remaining in detention in the wake of the district court's order granting parole (see note 5, *supra*) "either had their parole revoked for failure to comply with the terms of the district court's order * * * or arrived in this country after the government's promulgation of its new regulations." 727 F.2d at 962. Accordingly, the en banc court dismissed the government's appeal as to the APA issue and remanded with directions "that the injunctive relief grounded on the claimed APA violation be vacated." *Id.* at 984.[7]

Although the en banc court held that the petitioners' parole policy was not subject to a constitutional due process attack, it stated that excludable aliens "do have rights

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offers little guidance. * * * The Supreme Court has yet to offer a definitive test." 711 F.2d at 1480 (citations omitted).

[7] The district court did not immediately comply with the court of appeals' directive. Instead, on May 7, 1987, it simply vacated certain reporting requirements in the injunction. Petitioners appealed and, on September 2, 1988, the court of appeals reversed and remanded with directions that the injunction be vacated. *Jean* v. *Nelson*, 854 F.2d 405 (11th Cir.). On January 31, 1989, the injunction was finally lifted.



* * * to whatever process Congress—and through its regulations and established policies, the Executive branch—have extended them" (727 F.2d at 984). It accordingly remanded the case for further review to determine whether the class members had been afforded those rights. *Ibid.*

This Court then granted respondents' petition for a writ of certiorari, which addressed only the equal protection issue. The Court found it unnecessary to reach that issue, however, because the new regulations promulgated by the INS provided respondents with nondiscriminatory parole consideration—"all they seek to obtain by virtue of their constitutional argument." *Jean* v. *Nelson*, 472 U.S. at 855. The Court therefore affirmed the en banc court's judgment insofar as it remanded the case to the district court for a determination as to whether INS officials were acting in compliance with the new regulations. On the remand, respondents obtained no further relief.

3. On December 6, 1985, after the merits litigation had finally come to a close, the district court found that respondents were entitled to an award of fees, costs and expenses under EAJA. Pet. App. 88a-99a. Although recognizing that respondents did not prevail on their constitutional claims, the district court found that they were "prevailing parties" for purposes of EAJA because petitioners' appeal of the district court's APA ruling was dismissed, and respondents had secured the "two primiary goals" (*id.* at 89a-90a) of the litigation—"[petitioners] stopped the accelerated mass exclusion hearings and class members were released from indefinite incarceration" (*id.* at 90a-91a). The district court also found that petitioners' position on the APA issue was without substantial justification in law or fact (*id.* at 92a-95a).

After a hearing devoted to the reasonableness of the hours and the rates claimed, the district court issued a fur-

ther order establishing the amount of the EAJA award to respondents (Pet. App. 46a-87a).[8] In determining the number of hours reasonably expended in the litigation, the court considered and applied the 12 factors set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Pet. App. 54a-67a. In addition, it concluded that "some award is in order for counsel's efforts in the Supreme Court," and awarded fees for 25% of the hours spent in that portion of the litigation. *Id.* at 69a-70a.

Turning to consideration of the hourly rates to be applied in computing the award, the court held that respondents were entitled to rates in excess of the EAJA statutory cap of $75 an hour because of an increase in the cost of living and the limited availability of qualified counsel; it made no attempt to quantify the impact of either of these two factors. Pet. App. 72a-74a. The hourly rates awarded by the district court ranged from $50-$175 per hour. The district court then held that respondents were entitled to an additional 15% enhancement for four reasons: the pro bono publico nature of the case, the vindication of public rights, the emotional pressure on respondents' counsel and the government's litigious position. *Id.* at 74a-77a.[9]

Finally, the district court awarded respondents fees for the hours expended in litigating the fee award itself. In so ruling, the court did not consider whether the government's position in the fee litigation was substantially justified. It held such an inquiry was not required by

[8] The opinion reprinted at Pet. App. 46a-87a is a revision of the one originally entered by the court on August 29, 1986, which was vacated in response to respondents' motion for "amplif[ication]" of the award. See *id.* at 46a n.1.

[9] In its original August 29, 1986 opinion, the district court based its 15% enhancement on the limited availability of counsel, the risk of loss, the quality of work, and the results achieved.



EAJA, relying (*id.* at 84a-85a) on the statement in *Haitian Refugee Center, Inc.* v. *Meese*, 791 F.2d 1489, 1500 (11th Cir. 1986), that "we * * * decline to hold that this court may award fees for fees only if the government's position in the fees litigation was not substantially justified."[10] In total, the district court awarded respondents more than $1 million in attorney's fees, including more than $101,500 for their work on the fee petition. Pet. App. 85a, 86a-87a.

4. The court of appeals affirmed the district court's determination that the respondents were prevailing parties and that the government's position was not substantially justified (Pet. App. 11a-17a),[11] but vacated and remanded for a recalculation of the award (*id.* at 41a). Agreeing with petitioners, the court of appeals found that the district court had erred in awarding fees for respondents' unsuccessful Supreme Court litigation, because "[respondents] did not prevail on any legal issue or obtain any additional relief" in that phase of the litigation (*id.* at 18a-20a). The court also disapproved the district court's determination of the appropriate hourly rates. It found, first, that the proper starting point was the prevailing market rates for services of the kind and quality provided, not the factors listed in *Johnson* v. *Georgia Highway Express, Inc.*, *supra*. Even if the requested hourly rates did reflect pre-

[10] That portion of the *Haitian Refugee Center* opinion was subsequently vacated. *Haitian Refugee Center* v. *Meese*, 804 F.2d 1573, 1574 (11th Cir. 1986). See Pet. App. 38a.

[11] Like the district court, the court of appeals reached this conclusion by focusing solely on the government's position on the APA issue. Despite its earlier recognition that determining the scope of the exception for general statements of policy is "akin to wandering lost in a Serbonian Bog" (see note 6, *supra*), the court of appeals agreed that the government was not substantially justified in taking the position that the statement of the new parole policy was not a "rule" subject to the APA notice and comment requirement. Pet. App. 13a-17a.

vailing market rates, however, "the district court must still find that a cost of living increase or a 'special factor' justifies hourly rates of more than $75 before it can award fees at a rate in excess of this figure." Pet. App. 25a-26a. Here, the district court had failed to quantify in dollar amounts the impact of the cost of living on the overall fee award.

The court of appeals next considered the district court's conclusion that the limited availability of counsel warranted hourly rates in excess of the $75 cap. Although the appellate court acknowledged that *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2554 (1988), precluded consideration of the general level of competence of counsel or "a mere short supply of qualified lawyers willing to take a case for $75 an hour" (Pet. App. 28a) as a "special factor" justifying an enhanced hourly rate, it directed the district court to consider, upon remand, whether expertise in immigration law or fluency in French and Haitian Creole constituted such "special factors." *Id.* at 28a-29a.[12]

The court of appeals then rejected three of the four factors that the district court had relied on to justify an additional 15% enhancement of the fee award—the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel. The panel majority nevertheless concluded that the government's "litigiousness" in this case might be a special factor which would justify an increased award. Pet. App. 30a-33.[13]

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[12] The majority noted, however, that the attorney who had expertise in French and Haitian Creole had not requested an hourly rate in excess of $75. Pet. App. 29a.

[13] The dissent disagreed with the basis for the calculation of the cost of living adjustment, with the conclusion that the government's asserted litigiousness might be a "special factor," and also with the conclusion that competence in immigration law might be such a factor. Pet. App. 41a-45a.



Finally, the court of appeals concluded that the district court had not erred in awarding more than $100,000 in fees for work on the fee litigation without considering whether the government's position in that litigation was substantially justified. The court recognized the division in the circuits on this issue (Pet. App. 38a) but, agreeing with the approach taken by the Second Circuit in *Trichilo* v. *Secretary of Health & Human Services*, 823 F.2d 702, 707 (1987), concluded that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees' " (Pet. App. 39a-40a). Asserting that "[i]t would contravene Congress's purpose in passing the EAJA to require under all circumstances that successful EAJA fee applicants bear the costs of obtaining EAJA fees," the court expressly reserved the question "whether a 'technical defense' exception to [the liability] rule should exist" (*id.* at 40a, 41a, n.14).[14]

## SUMMARY OF ARGUMENT

The Equal Access to Justice Act is a limited waiver of sovereign immunity and, as such, may not be enlarged beyond what its language requires. Unlike other attorney's fee statutes, EAJA does not contemplate automatic fee-shifting. Instead, eligible prevailing parties may be awarded fees and costs only if the court finds that the

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[14] The reservation apparently referred to the suggestion of the D.C. Circuit in *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 214 (1986), that the government may "raise certain technical defenses, such as an untimely filing by the fee applicant, and defend against an application for 'fees for fees' on the ground that the technical defense is substantially justified." See Pet. App. 39a.

government's position was not substantially justified. Congress viewed this standard as striking the proper balance between the competing interests of assisting parties to challenge unreasonable governmental actions while at the same time assuring vigorous law enforcement.

A rule holding the government automatically liable for fees for litigation over a fee petition ("fees for fees") whenever its position on the merits portion of the litigation is not substantially justified imposes a standard for fee litigation that is more stringent than the statutory standard, without any basis in the Act for such a distinction. Moreover, such a rule disturbs the careful balance of objectives that Congress adopted. The government should not be forced to pay twice—once for its own attorneys and again for the fee claimant's attorneys—in order to challenge an exorbitant fee request or seek clarification of one or more of the unique provisions of EAJA. And because it requires the government to bear the costs of all fee litigation—even where the government's position in the fee litigation is not only reasonable, but also correct—the automatic rule also removes the usual incentives for a prevailing party to make a reasonable fee request or to consider settlement.

In contrast, requiring courts to inquire specifically into the reasonableness of the government's fee litigation position maintains the balance that EAJA was intended to achieve. If the government makes unreasonable fee arguments, it will have to pay fees for fees. Otherwise, it will not. Such a rule also encourages reasonable requests by fee applicants and reasonable responses by the government, thereby discouraging repetitive fee litigation.

The substantial justification rule may, of course, result in a prevailing party not being reimbursed for all of its litigation costs. But that is entirely consistent with other provisions of EAJA, which impose a cap on the hourly



rates that may be recovered, and limit recovery to hours that the court determines are reasonable. Moreover, application of this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983), may mean that a prevailing party does not receive compensation for hours spent on all claims in the litigation. If a claim by claim analysis can be required for making fee awards under 42 U.S.C. 1988, which does not have a "substantial justification" element, then *a fortiori*, it is appropriate for courts to consider separately the reasonableness of the government's position in fee litigation under EAJA. Finally, although the substantial justification rule creates a theoretical possibility of an "infinite regression" of inquiries into whether the government was substantially justified in taking a position at an earlier stage in the litigation, as a practical matter the government would have no incentive to litigate in this manner, and there is no evidence that this hypothetical concern has materialized in any of the circuits that have adopted the rule.

If the Court rejects our primary submission, we note that the rule suggested in *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988), although less consonant with the language and rationale of EAJA than the substantial justification rule, at least avoids the "infinite regression" problem without incurring the same adverse policy consequences as the automatic fee shifting rule adopted by the court of appeals. The *Russell* rule would provide for the automatic award of fees for fees with respect to litigation over whether the government's merits position was substantially justified. But when the fee litigation involves other issues—such as whether an application was timely filed, whether the applicant was a prevailing party, or what the proper hourly rate should be—fees for fees would be awarded only if the court concludes that the

government's position in the fee litigation was not substantially justified.

## ARGUMENT

### I. THE GOVERNMENT SHOULD BE LIABLE FOR FEES FOR FEES UNDER EAJA ONLY WHEN ITS POSITION IN THE FEE LITIGATION WAS NOT SUBSTANTIALLY JUSTIFIED

The Equal Access to Justice Act waives the sovereign immunity of the United States to allow parties who prevail in litigation against the United States to recover attorney's fees and expenses in certain defined circumstances subject to several important limitations. See generally *Pierce* v. *Underwood, supra*. It does not provide for automatic fee shifting. Instead, EAJA directs that a court "shall award" fees to any party meeting specified qualifications (see 28 U.S.C. 2412(d)(2)(B)) who prevails in a civil nontort action against the United States, "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A)).[15] Like all waivers of sovereign immunity, EAJA must be construed "strictly in favor of the sovereign," taking care not to "enlarge the waiver 'beyond what the language requires.'" *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986).

The question presented by this case—whether a determination that the government's position on the merits was not "substantially justified" means the government must automatically pay any additional fees incurred by the applicant in ligitation over the availability and size of the fee award—is not specifically addressed by the statute, and the courts of appeals have reached conflicting answers to

[15] This Court determined in *Pierce* v. *Underwood*, 108 S. Ct. at 2550, that the statutory term "substantially justified" means "justified in substance or in the main."



the question.[16] In our view, it is appropriate to include reasonable fees and expenses incurred in preparing a fee *application* as part of any award of fees for the merits phase of the litigation.[17] But the language and purposes

[16] The court below followed the approach of the Second Circuit in *Trichilo* v. *Secretary of Health & Human Services*, 823 F.2d 702 (1987), holding the government automatically liable for fees for fees whenever its position on the merits is not substantially justified. Accord *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989). Several circuits have required a separate inquiry into the justification for the government's position in the fee litigation. See *National Wildlife Federation* v. *Federal Energy Regulatory Comm'n*, 870 F.2d 542 (9th Cir. 1989); *Cornella* v. *Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d 321, 324 (7th Cir. 1985). In our petition, we also included *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985), on that list. In its recent decision in *Powell* v. *Commissioner*, 891 F.2d 1167, 1172 (5th Cir. 1990), however, a different panel of the Fifth Circuit characterized the *Russell* discussion on the fees for fees issue as dicta, and adopted the "automatic" rule.

In *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988), the court adopted an intermediate position, stating that the government will almost inevitably be liable for fees in the fee litigation if its sole claim is that it was substantially justified in arguing that its position on the merits was substantially justified; otherwise, however, an independent evaluation of the merits of the government position in the fee litigation is necessary. See discussion pp. 31-32, *infra*. Finally, in *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213 (D.C. Cir. 1986), the court, although "indicat[ing] a preference" for the automatic rule, suggested that such a rule would not apply when the government raised a "technical defense" to the payment of EAJA fees. See note 34, *infra*.

[17] Accordingly, we do not object to the conclusion drawn by the court in *Kelly* v. *Bowen*, 862 F.2d 1333, 1334-1335 (8th Cir. 1988), that reasonable fees and expenses incurred in preparing the EAJA fee application are compensable as part of the merits litigation. Accord *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1482 (Selya, J., concurring in part). As the court explained in *Kelly* (862 F.2d at 1334-1335):

of EAJA indicate that the government should not be required to pay for attorney's fees and expenses incurred in separate *litigation* over the availability and size of the fee award unless the position of the government in this distinct phase of the case was not substantially justified.

### A. The Language And Purposes Of EAJA Do Not Allow The Automatic Award Of Fees For Fees

The automatic award of fees for fees endorsed by the court of appeals in this case finds no support in the

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We think the time spent preparing the EAJA fee application should be compensable under the EAJA because it is "necessary for the preparation of the party's case." 28 U.S.C. § 2412(d)(2)(A). Preparation of the EAJA fee application is necessary to bring the matter before the court; counsel cannot recover any attorney's fees unless he or she first prepares an itemized statement of the time spent and subject matter discussed. Counsel must prepare the EAJA fee application whether or not the government subsequently decides to contest the amount of the attorney's fees claimed or the award of attorney's fees.

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Whether or not counsel is entitled to recover additional attorney's fees in connection with litigation over the propriety of attorney's fees awarded is a separate question.

Any award of fees for the preparation of the fee application should, of course, be subject to the overarching "reasonableness" limitation. It would not, for example, permit routine recovery for apparently exorbitant fee application requests—as, for example, respondents' claim of attorney fees and expenses for travel between Miami and Los Angeles as part of the expenses of preparation of the fee application. 10 Resp. C.A. Br. App., Tab 47 (Weisz Affidavit with reference to Attorneys' Fees). Cf. *Abel Converting, Inc.* v. *United States*, 695 F. Supp. 574 (D.D.C. 1988) (approximately 110 hours claimed for fee petition; reduced to approximately 46 hours). But as long as the amount of time and the rates claimed are reasonable, we would not oppose the inclusion of the time for preparation of the fee request in the calculation of the attorney fee for the merits litigation.



statutory language of EAJA. Nothing in that language indicates that fees for fees should be awarded automatically for any distinct phase of the litigation unless the government's position is found to lack substantial justification. The statute simply provides that fees are to be awarded to the prevailing party unless the "position of the United States" was substantially justified (28 U.S.C. 2412(d)(1)(A)). Fee litigation is different from litigation over the merits; the issues presented are not the same. Fee litigation is nevertheless part of the "civil action," and the "substantial justification" requirement therefore applies in full. To hold that the government is *automatically* liable for fees for fees is to impose a standard of liability for the fee litigation phase of the action that is different from (and much more stringent than) the standard set forth in the Act, without any statutory justification for doing so.

Although the statute defines "position of the United States" to include both the position taken in the underlying civil action and the action or failure to act upon which the civil action is based (28 U.S.C. 2412(d)(2)(D)), nothing in the statute refers specifically to the government's position in the fee litigation; there is certainly no suggestion that fees are to be paid for such litigation regardless of substantial justification. Surely, if Congress had intended to impose a different standard for the fee litigation, it would have said so. The statute, however, contains only a single standard: substantial justification.[18]

Indeed, to the extent that the statutory language addresses the issue, it suggests that Congress viewed the fee

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[18] This Court observed in *Pierce* v. *Underwood*, 108 S. Ct. at 2549, that "we do not think it appropriate to substitute for the formula that Congress has adopted any judicially crafted revision of it;" it is at least equally inappropriate to substitute a different standard for the fee litigation stage of the case.

litigation as a separate phase of the case, to be treated separately for the purposes of substantial justification analysis. The statute defines the term "fees and other expenses" to include the expenses "necessary for the preparation of the party's case" (28 U.S.C. 2412(d)(2)(A)); the implication is that attorney's fees are to be similarly limited to those required for the presentation of "the party's case"—*i.e.*, the case on the merits.[19] Once the case proceeds to litigation over the fees, it enters a new phase, and fees and expenses may be awarded as "necessary for the preparation" and presentation of *that* case only if the government's position at that stage is not substantially justified.

An automatic rule would also be inconsistent with the purposes of EAJA. In adopting the "substantially justified" standard, Congress specifically considered and rejected an automatic fee award. S. 2354, which was introduced in the 95th Congress, provided for automatic awards to prevailing parties. This mandatory award "was rejected because it did not account for the reasonable and legitimate exercise of governmental functions and thus might have a chilling effect on proper government enforcement efforts." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 13-14 (1980). A purely discretionary standard was also considered. It too was rejected, in part because it "offers little direction to the exercise of agency [or judicial] discretion." *Id.* at 14. Congress also rejected a Department of Justice proposal that would have made fees available only where the prevailing party could prove that the government action was "arbitrary, frivolous, unreasonable, or groundless, or the United States continued to

[19] It would be quite anomalous to have different standards for the payment of fees and of "other expenses," and nothing in the Act or its legislative history suggests any such distinction.



litigate after it clearly became so."[20] Congress believed that this standard would make fees too difficult to obtain, and thus, "the deterrent effect created by the cost of vindicating rights vis-a-vis the government would not be lessened." *Ibid.*

Congress viewed the "substantially justified" standard as an "acceptable middle ground" between an automatic award of fees and the restrictive federal proposal (*ibid.*), one which properly "balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights." S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979); cf. H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985) (disavowing intent to "chill public officials charged with enforcing the law from vigorously discharging their responsibilities. * * * The Committee recognizes [and] reaffirms the importance of federal enforcement of federal law * * *.").

The automatic award of fees for fee litigation would require the government to pay additional fees whenever it interposed an objection to an EAJA fee award—no matter how meritorious that objection might be. In this case, for example, the government advanced legal objections to a number of features of respondents' fee applications. We argued that respondents were not entitled to any compensation for their work before the Supreme Court; the court of appeals agreed. We also pointed out that the district court had failed to quantify what portion of the increased hourly rate was due to an increase in the cost of living; the appellate court agreed with that contention as well. Finally, the court of appeals agreed with our submission that

[20] This standard was based on the standard for the award of attorney's fees to prevailing defendants in cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). See *Christiansburg Garment Co* v. *EEOC*, 434 U.S. 412, 422 (1978).

the pro bono nature of the case, the fact that public rights were vindicated, and the emotional hardship on respondents' counsel did not constitute "special factors" justifying an enhanced fee award. But even though the appellate court plainly agreed with several of the government's fee arguments and, for that reason, vacated the fee award and remanded the case for further proceedings, the court nevertheless held that the government's position in the fee portion of the case was irrelevant to the question of libability for fees for fees. Thus, the "automatic" rule applied by the court of appeals requires the government to pay respondents' fees even though the government's litigating position was reasonable—indeed, even though the government in fact prevailed on many of these issues.

Penalizing the government for making fee arguments that are not only substantially justified, but are also correct, is clearly contrary to the language and purpose of EAJA, which was carefully crafted so that it would not deter the government from taking reasonable positions. H.R. Rep. No. 1418, *supra*, at 10-11, 13-14; H.R. Rep. No. 120, *supra*, at 10. Fee requests may be exorbitant,[21] and there is no indication Congress intended to discourage the government from contesting such requests. In addition, EAJA contains many novel provisions, and the usual way to explicate such provisions is by seeking an authoritative judicial interpretation. Congress must therefore have anticipated that there would be litigation to

[21] See, *e.g.*, *Van Sant* v. *United States Postal Services*, 805 F.2d 141, 142 (4th Cir. 1986) ($194,162 fee request, $5,000 awarded; hours claimed "grossly inflated"); *Digennaro* v. *Bowen*, 666 F. Supp. 426 (E.D.N.Y. 1987) (130.5 hours claimed, reduced to 45 hours); *Illinois Migrant Council* v. *Pilliod*, 672 F. Supp. 1072 (N.D. Ill. 1987) (724 hours claimed, reduced to 424 hours); *Poslednik* v. *Sullivan*, 718 F. Supp. 1097 (S.D.N.Y. 1989) (more than 200 hours claimed, reduced to 80.5 hours).



define the proper application of such statutory terms as "position of the United States" (see cases cited at H.R. Rep. No. 120, *supra*, at 9 n.14), "substantial justification" (*Pierce* v. *Underwood*, *supra*), or "special factor[s]" justifying an award at a rate in excess of the statutory fee cap (*ibid*). There is no suggestion in the statute or its legislative history that Congress intended to deter the government from litigating such issues, so long as its position with regard to them was substantially justified.

In sum, the fees for fees rule adopted by the court below turns EAJA into an automatic fee shifting statute, which is not what Congress intended and not what the statutory scheme prescribes. Cf. *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983) (under EAJA, the government cannot be directed to pay fees for its reasonable positions in a case); *Matthews* v. *United States*, 713 F.2d 677, 684 (11th Cir. 1983) (same). There can be little doubt that such a rule would "chill public officials charged with enforcing the law from vigorously discharging their responsibilities." H.R. Rep. No. 120, *supra*. The government will surely be less inclined to resist questionable or exorbitant fee requests when the costs of challenging such requests will always include not only the government's own litigating expenses, but the opposing party's as well.[22] Such a tax on government efforts to advance reasonable litigating positions is plainly contrary to the careful balance Congress sought to strike when it enacted EAJA.

[22] EAJA awards must be paid by the agency "from any funds made available to the agency by appropriation or otherwise" (28 U.S.C. 2412(d)(4)), not from the judgment fund. Cf. 131 Cong. Rec. S9995 (daily ed. July 24, 1985) (remarks of Sen. Weicker) ("all claims paid by the agency will be paid out of [the] agency's annual budget and not from agency requests for additional funds"). The possibility of large EAJA awards is accordingly particularly troubling for agencies with relatively small appropriations.

### B. The Definition Of "Position Of The United States" Does Not Justify A Rule Of Automatic Fees For Fees

Courts of appeals that have adopted the automatic rule have relied at least in part on the fact that in 1985, Congress amended EAJA to add a definition of "position of the United States." [23] See, *e.g.*, *Powell* v. *Commissioner*, 891 F.2d 1167 (5th Cir. 1990); *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989); *Trichilo* v. *Secretary of Health & Human Services, supra*. The amendment was added to make clear that the term included not only the government's litigating position, but also the underlying agency action or inaction that was the basis of the litigation. Nothing in the amendment itself, therefore, bears on the "fees for fees" issue.[24] The courts have instead relied on the legislative history, which explains that the amendment was made out of the following concern:

> If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed

[23] As noted at pp. 16-17, *supra*, under that definition, "position of the United States" includes not only the position taken by the government in the civil action, but also the action or failure to act by the agency which gave rise to the litigation.

[24] As Senator Charles Grassley, one of the sponsors of the bill containing the amendment, explained in presenting the bill to the Senate, "the purpose of the Equal Access to Justice Act is to make Government bureaucrats think long and hard before they start an enforcement action. The focus of the Equal Access to Justice Act is not on making Government litigators behave once in court" (131 Cong. Rec. S9992 (daily ed. July 24, 1985). The special fees for fees rule applied by the court below does, of course, focus precisely on the behavior of government litigators in court, and penalizes the government for litigating EAJA issues.



> "reasonable" litigation positions; thereby having the effect of substantially justifying their position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980.

H.R. Rep. No. 120, *supra*, at 12 (citation omitted). This statement of purpose, however, does not support an automatic fees for fees rule.

If the underlying agency action is unreasonable, an aggrieved citizen will inevitably incur some expense in challenging that action in court, even if only to file a complaint and negotiate a settlement. Thus, Congress concluded that it is proper to award such a citizen reasonable attorney's fees for establishing that the underlying action is unlawful, notwithstanding that the government's conduct of the litigation itself is substantially justified. It does not follow, however, that a person who has suffered unreasonable agency action should automatically be awarded whatever attorney's fees he incurs in subsequent stages of the litigation, whether it be in defining the appropriate relief to be awarded,[25] in litigating appeals, or in determining the availability and amount of attorney's fees. The careful balance Congress sought to establish when it enacted EAJA can be maintained only if a separate "substantial justification" inquiry is undertaken for these distinct stages in the litigation.

In many cases, for example, even if the court concludes that the government's underlying position regarding

[25] We note that a somewhat analogous question, in the context of appeals taken from a district court's imposition of Rule 11 sanctions, is presented in *Cooter & Gell* v. *Hartmarx Corp.*, No. 89-275 (argued Feb. 20, 1990).

liability was not substantially justified, its position as to the appropriate scope of relief may be entirely justified. For instance, in an immigration case, even if the court finds that the Board of Immigration Appeals has acted unreasonably in denying a request for suspension of deportation and grant of permanent resident status pursuant to 8 U.S.C. 1254(a)(1), it does not follow that the government would be acting unreasonably in insisting that the court remand the case to the Board for reconsideration of that request rather than granting suspension of deportation outright. This is in fact what the law requires. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77 (1957). See, *e.g.*, *Chung* v. *INS*, 602 F.2d 608 (3d Cir. 1979) (remanding to Board for reconsideration of suspension of deportation under proper standards); *Wang* v. *INS*, 413 F.2d 286 (9th Cir. 1969) (same). Thus, if a claimant in such a case were to demand that the court itself grant him Section 1254(a)(1) relief, it would make no sense to require the government to reimburse the claimant for his attorney's fees in advancing such an inappropriate claim. Similarly, there may be cases where the government would not be substantially justified in opposing relief in the district court, but would be substantially justified in taking an appeal, for example if there had been an intervening change in the law. Alternatively, there will be cases—such as this one—where the government may not be substantially justified in opposing all relief in the district court, but is substantially justified (indeed, prevails) in resisting a cross-appeal seeking a finding of liability on other grounds.

For the same reasons, the fact that the government is not substantially justified in the position it takes on the merits in litigation should not mean that an award of fees for fees is automatically appropriate, without regard to



the reasonableness of the position taken by the government in the fee stage of the litigation. Fee litigation is separate from the merits portion of a case. If the underlying agency conduct or the government's position in the merits litigation is unreasonable, the government will be liable for fees for the merits portion of the case. Similarly, if the government's position on the fees portion of the case is not substantially justified, the government will be held liable for fees for fees. But the "incentive for careful agency action" is in no way diminished if the government is not required to pay fees for fees when its position in that portion of the case is substantially justified.[26]

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[26] In the same remarks cited above (note 24), Senator Grassley stated that:

> Consistent with the general rule that successful litigants are ordinarily entitled to fees for their litigation of a fee application, a prevailing Equal Access to Justice Act party is eligible to recover attorney's fees for the fee litigation itself, subject to the Equal Access to Justice Act's terms, in any case in which the Government's position in the case, as defined in the bill, was not substantially justified.

131 Cong. Rec. S9992 (daily ed. July 24, 1985). Senator Grassley's statement does not suggest that EAJA prevailing parties are automatically entitled to fees for fees. Instead, they are "eligible" for such fees, "subject to the Equal Access to Justice Act's terms"—*i.e.*, if the government's position in the fee litigation was not substantially justified. Senator Grassley's statement apparently contemplates that a separate inquiry should be made into the reasonableness of the government's position in the fee litigation itself. If the government's position in that litigation is found to be unreasonable, then fees for fees may be awarded.

### C. Policy Considerations Do Not Justify An Automatic Award Of Fees For Fees

Nor does the fact that prevailing parties are generally awarded fees for fees under other fee shifting statutes mean such fees should be routinely awarded under EAJA. As the court of appeals itself recognized (Pet. App. 30a), EAJA constitutes a partial waiver of the government's sovereign immunity, and must, therefore, be strictly construed according to its particular terms. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 686 (1983); *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). The courts should not, in the guise of interpreting its terms, transform it into an automatic fee shifting statute by disregarding the "substantial justification" proviso.

In particular, policy arguments cannot substitute for a congressional waiver of immunity. In *Library of Congress* v. *Shaw*, *supra*, the issue was whether Congress, in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, had waived the government's immunity from interest. Respondent in that case argued that the policy reasons that had motivated Congress to permit recovery of a "reasonable" attorney's fee required that the statute be read to waive the government's immunity from interest. This Court rejected that argument (478 U.S. at 321):

> [P]olicy, no matter how compelling, is insufficient, standing, alone to waive this immunity:
>
> > "[T]he immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. [654], 663 [(1947)]."

Similarly, in this case the statutory standard for awarding fees to the prevailing party "unless * * * the position of the United States was substantially justified" (28 U.S.C. 2412(d)) cannot be overcome by resort to policy arguments. In any event, we submit that policy considerations support the substantial justification limitation Congress selected, for fee litigation no less than for the merits.



Requiring courts to make a separate inquiry into the reasonableness of the government's fee litigation position maintains the careful balance that Congress established in EAJA: if the government makes fee arguments that are not reasonable, it will have to pay the prevailing party fees for fees, but otherwise it will not. The substantial justification rule thus retains the deterrence factor that Congress intended, while at the same time allowing the government to carry out its duty to protect the public fisc. It also gives prevailing parties every incentive to make reasonable fee requests, thus minimizing the burdens on the courts, as well as the parties, of further litigation over fee applications.[27]

It is of course true that conducting a separate inquiry into the reasonableness of the government's position in the fee portion of the case may result in a prevailing party not receiving compensation for all of its litigation expenses.[28]

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[27] This litigation-minimizing effect of the substantial justification rule offsets the apparent ease of application of an automatic rule. Of course, even if the balance tipped the other way, that would not justify a judicial rewrite of EAJA. As the dissent observed in *McDonald*, 884 F.2d at 1483, "we have no right, in the name of judicial economy, to expand EAJA's sweep or to open the sovereign's coffers more widely than Congress intended."

[28] This does not mean that prevailing parties will be given a life line that is "a foot short." See *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989). If the prevailing party makes a fee request that is reasonable, the government should ordinarily be expected to go along with it; the party would also recover fees for the time reasonably spent in preparing the request (see note 17, *supra*). If, on the other hand, the government, without substantial justification, opposed a reasonable fee request and thereby provoked unreasonable litigation over fees, EAJA would permit the court to hold the government liable for such fee litigation.

But Congress evidently contemplated that EAJA prevailing parties would not necessarily be compensated for all their legal expenses, since it provided a statutory cap on the hourly rate at which fees are to be awarded. Cf. *Pierce* v. *Underwood*, 108 S. Ct. at 2554 ("Congress thought that $75 an hour was generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be."). In addition, EAJA, like other fee shifting statutes, limits the fees that can be recovered to "reasonable attorney fees." 28 U.S.C. 2412(d)(2)(A). See *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 (1983) ("The district court also should exclude from th[e] initial fee calculation hours that were not 'reasonably expended.' "). The fact that counsel has billed a prevailing party for a certain number of hours thus does not mean that the fee award will also cover all those hours, since the number of hours may be excessive. See, *e.g.*, *Poslednik* v. *Sullivan*, 718 F. Supp. 1097 (S.D.N.Y. 1989).

It is also true that the substantial justification approach, unlike the automatic rule, will require the court to consider separately the justification for the government's fee litigation. But courts are often required to examine a party's claims in deciding the appropriate amount of a fee award. In *Hensley* v. *Eckerhart, supra*, this Court provided guidelines for calculating awards to "prevailing parties" under fee shifting statutes.[29] Where claims are based on different facts and legal theories, "[t]he congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." 461 U.S. at 435

[29] Although *Hensley* itself arose under 42 U.S.C. 1988, the Court noted that "[t]he standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.' " 461 U.S. at 433 n.7.



(footnote omitted). Moreover, if the plaintiff obtains only limited success on various claims that involve a "common core of facts" or "related legal theories," then a fee award compensating him for all of the hours spent in the litigation would not be reasonable. *Ibid.*[30] In short, in determining the fee to be awarded to a prevailing party who has not been completely successful in the litigation on the merits a court must undertake a careful examination of the claims being made as well as the facts and legal theories underlying them. See also *Texas State Teachers Ass'n* v. *Garland Independent School District*, 109 S. Ct. 1486, 1493 (1989).

Since a court must, under this Court's teaching in *Hensley*, make a careful examination of each *claim* when the only criterion for the fee award is that the party has "prevailed," it is not unreasonable to expect a court to consider the reasonableness of the government's position in various *stages* of the litigation when Congress has expressly added the "substantial justification" requirement to the attorney's fee statute. *Porter* v. *Heckler*, 780 F.2d 920, 922 (11th Cir. 1986).

Finally, it is also true, at least as a theoretical matter, that inquiring into whether the government was substantially justified in arguing in fee litigation that its position on the merits was substantially justified could lead to an "infinite regression," with the government asserting in response to each succeeding fee application that its defense to the preceding application was substantially justified. See *Cinciarelli* v. *Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984). But while such a scenario is perhaps imaginable, it has not developed in any of the circuits that apply the substantial justification rule to fee litigation. This is

[30] In contrast, if the plaintiff has achieved "excellent results" on such interrelated claims, he should receive a "fully compensatory fee." 461 U.S. at 435.

scarcely surprising: as a practical matter the government would have little or no incentive to invite a court repeatedly to add on to the fee litigation bill once that court has determined that the government's fee position was not substantially justified—particularly since the government could prevail on appeal only by demonstrating that the "no substantial justification" determination was an abuse of discretion. *Pierce* v. *Underwood*, 108 S. Ct. at 2548. It follows that the government will not lightly challenge findings that its position lacked substantial justification, and *a fortiori* that it will not engage in the sort of "infinite regression" of challenges that concerned the *Cinciarelli* court and the court below.

On the other hand, the automatic rule adopted by the court below will encourage prevailing parties to file unreasonable fee requests, since regardless of the merits of such requests, the government will have to bear all the costs of litigating them.[31] Indeed, as the dissent observed in *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1482-1483:

> The more esurient the request, the more likely the government will oppose it; the more heroic the opposition, the more time will reasonably be spent litigating the matter; the more protracted the litigation, the greater the number of hours reasonably expended on it; the more hours spent, the higher the fee award (notwithstanding whatever trimming may be done in the name of 'reasonableness').

[31] See note 22, *supra*. To avoid this burden, the government could, of course, simply acquiesce, and agree to pay even unreasonable fee requests. Nothing in EAJA suggests that Congress intended to encourage the government to adopt that policy. See p. 20, *supra*.



Thus, the automatic rule will further burden the courts with what this Court in *Pierce* v. *Underwood*, 108 S. Ct. at 2548, recognized as litigation unlikely to result in "law-clarifying benefits".

Moreover, since a prevailing party will have nothing to lose by litigating the fee request, the automatic rule undermines the incentive to settle and thus is likely to discourage settlement of fee disputes.[32] Indeed, such a rule, much more than any prospect of "infinite regression of EAJA litigation" (Pet. App. 38a), is likely to multiply the amount of time the courts and the parties devote to judicial proceedings contesting matters related to attorney's fees. No reasonable policy supports such an invitation to protracted meritless litigation.

## II. AT THE VERY LEAST, THE AUTOMATIC RULE SHOULD BE REJECTED FOR ISSUES OTHER THAN WHETHER THE GOVERNMENT WAS SUBSTANTIALLY JUSTIFIED ON THE MERITS

For the above reasons, we submit that the careful balance between the interests of private litigants and the need for effective law enforcement established in EAJA requires that private litigants be awarded fees for the fee litigation only when the government's position in that litigation is not substantially justified. If, contrary to this submission, the Court concludes that EAJA can and should be interpreted to provide more liberal reimbursement to those who have established that the government's position on the merits is not substantially justified, there is an alternative approach that, although for the reasons explained above we believe is less consonant with the statutory language and purpose than the substantial

[32] As this Court recognized in *Hensley*, 461 U.S. at 437, settlement is ordinarily the best way to dispose of a fee application.

justification rule, nevertheless avoids some of the adverse policy consequences of the automatic approach.

In *Russell* v. *Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), vacated on other ground, 108 S. Ct. 2891 (1988), the court of appeals stated that where the government's only claim in the fee litigation is that its position on the merits was substantially justified, and that claim is rejected, the government will be liable for fees for the fee litigation without further consideration of whether it was substantially justified in making that claim. On the other hand, when the government's opposition to the fee application is based on other issues—such as whether the claimant filed a timely EAJA application, or was a prevailing party, or is entitled to an enhanced rate above the $75 an hour cap—the substantial justification for those claims must be considered before fees may be awarded for the fee litigation. Cf. *United States* v. *Estridge*, 797 F.2d 1454, 1460 (8th Cir. 1986) (government's position in fee litigation not substantially justified where opposition to fee award based solely on claim that government position on the merits was substantially justified).

Although based in part on reasoning which is no longer valid,[33] the *Russell* rule does avoid the possibility of the "infinite regression of EAJA litigation" that has troubled

[33] The *Russell* court adopted the proposition, subsequently rejected in *Pierce* v. *Underwood*, *supra*, that a showing of substantial justification requires more than that the government's position be "merely reasonable." In its fees for fees analysis, the court apparently assumed that whenever a court in fee litigation rejects the government's contention that its position on the merits was substantially justified, the court necessarily also concludes that the government was not substantially justified in making that contention. This assumption incorrectly equates the rejection of an argument with the finding that there was no substantial justification for making the argument.



several courts (Pet. App. 38a).[34] At the same time, the *Russell* rule does not have the same litigation-encouraging effect as the automatic rule, since the prevailing party's incentive to make reasonable fee requests is retained. Finally, the *Russell* rule serves the interests of judicial economy. It will in many cases relieve the court from the necessity of evaluating the merits of the government's position in the fee litigation. And, to the extent that it discourages government challenges to fee applications based solely on the merits of the government's litigating position, that rule also minimizes fee litigation.

[34] The D.C. Circuit was motivated by concern for the asserted "infinite regression" problem when it suggested the "technical defense" exception to the automatic rule. *American Academy of Pediatrics* v. *Bowen*, 795 F.2d 211, 213-214 (1986); cf. *Powell* v. *Commissioner*, 891 F.2d 1167 (5th Cir. 1990) (noting, but reserving judgment about such an exception); *McDonald* v. *Secretary of Health & Human Services*, 884 F.2d at 1481 n. 13 (same); Pet. App. 41a, n.14 (same). The court asserted in *American Academy of Pediatrics* that when the government raises a "technical defense" to a fee application, an award of fees for the fee litigation is appropriate only if that defense was not substantially justified. But if the court concludes that the technical defense was not substantially justified, the government is thereafter liable for all fees in the fee litigation, and it cannot subsequently argue that it was substantially justified in arguing that it was substantially justified in raising the technical defense. 795 F.2d at 213.

The defense asserted in *American Academy of Pediatrics* was that the fee application was not timely filed; the court did not define what other claims might be considered "technical" for purposes of its proposed rule. It did, however, note the possibility that a claim that an EAJA application contained an excessive number of hours might also be considered a "technical defense" (795 F.2d at 214). If the term "technical defense" were interpreted that broadly, it would appear to apply to virtually any defense other than substantial justification. In that event, the proposed D.C. Circuit rule would be indistinguishable from the *Russell* rule.

In short, although the *Russell* rule is less securely grounded in the language and purpose of EAJA than the substantial justification rule, and was adopted in response to concerns that we believe are more imaginary than real, it is nevertheless preferable to the automatic fees for fees rule adopted by the court of appeals.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*
STUART M. GERSON
*Assistant Attorney General*
THOMAS W. MERRILL
*Deputy Solicitor General*
HARRIET S. SHAPIRO
*Assistant to the Solicitor General*
WILLIAM G. KANTER
MICHAEL JAY SINGER
MARY K. DOYLE
*Attorneys*

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## QUESTION PRESENTED

Whether—in a case where it is determined that the government's underlying action was not substantially justified and the government is therefore liable for fees under the Equal Access to Justice Act—the prevailing party is entitled to an award of reasonable attorney's fees for defending its fee application without a second, separate inquiry into whether the government's litigation position in the fee litigation was substantially justified.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

**No. 89-601**

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GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,

*Petitioners,*

—v.—

MARIE LUCIE JEAN, ET AL.,

*Respondents.*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## BRIEF FOR THE RESPONDENTS

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## STATUTORY PROVISIONS INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1982 & Supp. V 1987), provides in relevant part, in addition to those sections cited in Petitioners' Brief ("Pet. Br.") at 2-3:

> (1)(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an

itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

• • • •

(2)(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings[.]

## STATEMENT

Congress enacted the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"), to enable persons affected by unjustified governmental action to seek redress undeterred by the prohibitive cost of litigation:

> The purpose of the Equal Access to Justice Act is to reimburse individual[s] who successfully litigate against federal bureaucracy. This will force Government agencies to be responsible for their conduct and will provide those with modest means with access to the courthouse door.
>
> • • • •
>
> They say that "You can't fight city hall," and the prevailing attitude of many today is that even if you do fight the Federal Government and win in court, you still lose because of the cost. We must eliminate the possibility of such Pyrrhic victories. . . . Equal justice is not available when one cannot afford to fight.

131 Cong. Rec. S9997-S9998 (daily ed. July 24, 1985) (statement of Sen. Domenici). EAJA fulfills this purpose by providing an award of "fees and other expenses" to private litigants of limited means who prevail in litigation against the government "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A).

In 1985 Congress found that government litigators were using EAJA's "substantial justification" eligibility threshold to nullify the effect of the statute by arguing that the relevant inquiry was into the government's litigation position. *See* H.R. Rep. No. 120, 99th Cong., 1st Sess. 8-14, 17, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 136-43, 145-46. Congress therefore amended EAJA to require the court to consider the underlying agency act or omission when determining "substantial justification" by defining "position of the United States" to mean "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D).

Congress stated that "the amendment will make clear that the Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation." H.R. Rep. No. 120, *supra* at 11. The government nonetheless now seeks a ruling that a critical component of EAJA fees—fees for defending the fee

petition—may be defeated solely by the assertion of a "reasonable" litigation position.

### A. The Facts Giving Rise to the Fee Petition[1]

The government's passing reference to the agency act underlying this litigation as a "response to an influx of undocumented excludable aliens from the Caribbean region" (Pet. Br. at 4) warrants some elaboration. This "response," which commenced during the week of June 1-5, 1981, was a revolution in existing policies and procedures for Haitian refugees seeking asylum in the United States in at least two significant aspects. *Jean v. Nelson*, 711 F.2d 1455, 1462 (11th Cir. 1983).[2]

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1 Petitioners' opening brief, as discussed in the text, reformulates the narrow issue on which certiorari was sought, incompletely recites facts as to matters on which review was expressly not sought, and does not recite essential facts from the actual record in this case—as to the fee award in issue and the proceedings below—which make its academic parade of horribles and claimed policy needs hypothetical and insubstantial. Accordingly, we divide our Statement into facts as to the merits, facts concerning the determination on the fee award in the district court, and facts as to the appeal from the fee award.

2 The numerous opinions in this case referred to herein are: *Louis v. Meissner*, 530 F. Supp. 924 (S.D. Fla. 1981) (on motion for preliminary injunction) ("*Jean I*"); *Louis v. Nelson*, 544 F. Supp. 973 (S.D. Fla. 1982) (after trial) ("*Jean II*"); *Jean v. Nelson*, 683 F.2d 1311 (11th Cir. 1982) (on motion for stay pending appeal) ("*Jean III*"); *Jean v. Nelson*, 711 F.2d 1455 (11th Cir. 1983) (on appeal to the Eleventh Circuit) ("*Jean IV*"); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (on rehearing *in banc*) ("*Jean V*"); *Jean v. Nelson*, 472 U.S. 846 (1985) (on writ of certiorari to the Court of Appeals for the Eleventh Circuit) ("*Jean VI*"); *Louis v. Nelson*, 624 F. Supp. 836 (S.D. Fla. 1985) (regarding entitlement to fees) ("*Jean VII*"); *Louis v. Nelson*, 646 F. Supp. 1300 (S.D. Fla. 1986) (regarding amount of fees) ("*Jean VIII*"); *Jean v. Nelson*, 863 F.2d 759 (11th Cir. 1988) (on appeal of fee award) ("*Jean IX*"). *Jean VII*, *Jean VIII*, and *Jean IX* are reprinted in the Petitioners' Appendix ("Pet. App.") at 1a-99a. Evidence adduced at trial may be found in the record ("R. at _____") and plaintiffs' exhibits ("PX _____"). Portions of the record on fees are contained in a ten-volume appendix to respondents' brief in the Court of Appeals ("_____ Resp. C.A. Br. App., Tab _____"). The proceedings in this Court are the



First, the government subjected Haitians to an unprecedented exclusion procedure, under which the INS immediately served asylum applicants with notice to appear for exclusion hearings in a manner designed to cut off their otherwise existing right to claim asylum before district directors and, effectively avoiding the district directors, then held mass exclusion hearings that prevented individual representation of applicants. (Memorandum of INS Acting Commissioner, PX 94; J. App. at 89-96). INS officials held these hearings behind locked courtroom doors and deliberately routed Haitians being brought to the INS courtroom from the detention center through back stairwells and immigration offices at a double-time pace to avoid lawyers known to be waiting in public areas of the courthouse to provide the Haitians with free legal assistance. (R. at Vol. 45, pp. 1596-98.) "Many hearings were held behind locked doors in courtrooms from which counsel attempting to inform the Haitians of their rights were barred. Overwhelming evidence established that Creole translators were so inadequate that Haitians could not understand the proceedings nor be informed of their rights." *Jean IV*, 711 F.2d at 1462-63; *see also Jean I*, 530 F. Supp. at 926-28.[3]

Second, the government abruptly reversed a policy that had been followed for nearly thirty years by instituting a program of prolonged incarceration for Haitians awaiting political asylum hearings. *Jean II*, 544 F. Supp. at 983.[4] Pursuant to this

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Petition for Writ of Certiorari ("Pet."), Petitioners' Appendix ("Pet. App."), Petitioners' Reply Memorandum ("Pet. Rep."), Petitioners' Brief herein ("Pet. Br."), and the Joint Appendix ("J. App.").

3 For the past six years the government has repeatedly stated that the panel opinion in *Jean IV* was "vacated" when rehearing *in banc* was granted (*see, e.g.*, Pet. Br. at 6) without informing this or any other court that the *in banc* court expressly adopted the factual findings of the panel. *See Jean V*, 727 F.2d at 962; *see also Jean IX*, Pet. App. at 4a n.2 ("[T]he granting of rehearing in banc vacated the panel opinion. . . . The in banc court, however, adopted the panel and district court statements of the facts.").

4 From 1954 until the change of policy, the INS paroled all aliens pending a determination of their admissibility unless the alien was likely to abscond or posed a threat to national security. *Jean VI*, 472 U.S. at 849.

new policy, the INS shipped Haitians from Florida, where they were already represented by immigration lawyers, to federal prisons and INS detention facilities located in "desolate, remote, hostile, culturally diverse areas containing a paucity of available legal support and few, if any, Creole interpreters." *Jean I*, 530 F. Supp. at 926. They separated husbands from wives and parents from children, with "cruel results." *Jean II*, 544 F. Supp. at 981 n.24. They applied the detention policy to Haitian children, *id.*; *see also* (PX 45, R. at Vol. 45, pp. 1529-31; PX 46, *id.* at 1561-62; PX 48, *id.*).

They held class members in substandard facilities and subjected them to harsh conditions. (R. at Vol. 41, pp. 918-19.) They physically abused some Haitians, (R. at Vol. 43, pp. 1224, 1251), and denied others appropriate care for their medical conditions. (*Id.* at 1258.) They moved some Haitians to other facilities at night, without allowing them to take their clothes or belongings and without telling them where they were going, leading some to be terrified that they were being returned to Haiti. (R. at Vol. 41, pp. 923-25.)

The effect of this long-term, isolating and abusive detention was predictable. (*See* Master's Report and Recommendations at 12, 14, 15, 16, 18, R. 2112, 2114, 2115, 2116, 2118; PX 62.1A, R. at Vol. 39, pp. 335-36). The mental health of many of the Haitians in detention deteriorated rapidly under these conditions. (R. at Vol. 39, pp. 370-71; Vol. 42, p. 1058.) One of the named plaintiffs, Prophete Talleyrand, was one of several class members who committed suicide while incarcerated during the pendency of this litigation. *Jean VIII*, Pet. App. at 76a; *see also* GAO, *Detention Policies Affecting Haitian Nationals* at 20-21 (1983).

This new policy was not implemented by formal rulemaking or agency operations instructions. Instead, notwithstanding the pendency of this lawsuit advising the INS of its failure to comply with the Administration Procedure Act, 5 U.S.C. § 553 ("APA"), INS and Department of Justice officials made no effort to promulgate guidelines or supervise operating personnel who exercised delegated authority. *Jean II*, 544 F. Supp. at 981; *Jean IV*, 711 F.2d at 1473-74. Inevitably, there were "inconsistencies between what the government witnesses said the policy was and the policy their subordinates were carrying out." *Jean II*, 544 F. Supp. at 981 n.24. Pointedly, no one in the chain of command from the Attorney General to the front line officers at the Krome detention center in Miami (where many class members were being detained) admitted to ever receiving or giving guidance as to who should be paroled and who should be indefinitely incarcerated. *Jean IV*, 711 F.2d at 1473-74.



The district court could "not think of any administrative action that would have a greater impact on a regulated group of people," *Jean II*, 544 F. Supp. at 997, and aptly observed that "these refugees, seeking the promised land, have instead been subjected to a human shell game [by] the arbitrary Immigration and Naturalization Service . . . . INS officials have acted as haphazard as the rolling seas that brought these boat people to this great country's shores . . . . [E]ven though INS officials have been rudderless in the enunciation and application of an immigration policy, when they decided to move the Haitians to these remote areas, they acted with laser-like precision." *Jean I*, 530 F. Supp. at 926.

The litigation that ensued commenced on June 10, 1981, when respondents, a class of black Haitian refugees seeking asylum, filed an emergency habeas corpus petition challenging, in part, the procedural fairness of the mass exclusion hearings and the discriminatory treatment of Haitians. *Jean IV*, 711 F.2d at 1462. After a hearing that documented the procedural irregularities and the inaccurate, misleading translations of the mass hearings, the government confessed error, but not before the government had improperly deported eleven Haitians. *Jean I*, 530 F. Supp. at 928; *see also Jean IV*, 711 F.2d at 1463 n.1 (the government admitted its procedures "were faulty and not in compliance with law").

The district court promptly entered interim relief. On July 10, 1981, the district court vacated and remanded to the INS all final orders of exclusion that had been entered pursuant to the faulty procedures and stayed all further deportations of class members. On September 9, 1981, the district court entered a temporary restraining order, later converted to a preliminary injunction, staying exclusion hearings for unrep-

resented class members and enjoining INS from deporting any member of the class. *Jean I*, 530 F. Supp. at 929-30. In a strongly worded opinion, the district court found serious fault with the closed-door accelerated exclusion hearings, the improper deportations, *id.* at 928, and, the "human shell game." *Id.* at 926; *see also Jean IV*, 711 F.2d at 1463. The court held that respondents were likely to succeed on the merits of their claims and that the "INS has thwarted the statutory and regulatory rights of these refugees to representation in their exclusion proceedings." *Jean I*, 530 F. Supp. at 927. The government did not appeal this order.

Notwithstanding this early indication of the lack of merit of its position, the government caused extensive pre-trial discovery and motion practice, and forced a lengthy trial on the underlying facts rather than simply engage in APA rulemaking that could have alleviated within weeks the harsh and traumatic effects of its action. Steadfastly, the government refused even to admit that there had been a policy change, contesting virtually every factual issue underlying respondents' APA claim. *Jean IX*, Pet. App. at 32a-33a; *see also Jean VIII*, Pet. App. at 76a-77a. Courts have since three times had occasion to remind the government (in the context of the government's endlessly renewed assertion that its "action" for EAJA purposes was "substantially justified") that "[i]t was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures," *Jean VII*, Pet. App. at 94a-95a, and that "[t]he government even opposed Plaintiff's efforts to seek summary judgment on the A.P.A. issue and thereby unnecessarily prolonged the litigation." *Jean VIII*, Pet. App. at 77a; *see also Jean IX*, Pet. App. at 17a.

On June 18, 1982, after a six-week trial, the district court held that the government had violated the APA by instituting an incarceration policy without formal rulemaking. *Jean II*, 544 F. Supp. at 997. The court also ruled that under the Equal Protection component of the Due Process clause, respondents could not be denied parole solely because of their race and/or national origin, but held that plaintiffs had



failed to prove that petitioners intended to discriminate, despite the disproportionate impact of the detention policy on Haitians. *Id.* at 998-1001. After considering briefs and extensive oral argument, the court of appeals denied the government's application for a stay pending appeal stating that the government had failed to demonstrate *any* of the four factors needed for a stay, including likelihood of success on their APA arguments. *Jean III*, 683 F.2d at 1312.

Upon the government's expedited appeal of the APA ruling and related release plan and respondents' cross-appeal, a panel of the court of appeals for the Eleventh Circuit:

> (a) affirmed the district court's APA ruling and agreed with the lower court finding that the INS had changed its prior policy of release and adopted a new policy of incarceration for all undocumented Haitians, and that this drastic change was a rule not within any of the rulemaking exceptions of the APA, *Jean IV*, 711 F.2d at 1483;
>
> (b) reversed the district court's Equal Protection ruling as "clearly erroneous," holding that plaintiffs had proven a "stark pattern" of intentional discrimination through "a mass of testimony and documents," *id.* at 1501, in addition to "a wealth of statistical evidence," *id.* at 1487, which was essentially unrebutted but for defendants' "mere protestation" and "arguments of counsel," *id.* at 1501-02;
>
> (c) on the claim that the government had denied respondents early notice of their rights to petition for asylum, held that the issue was justiciable and that the INS' "failure to notify an alien of the right to claim asylum, thereby closing the door entirely on the process, [violated] the right to present a petition for asylum," *id.* at 1507; and
>
> (d) recognized that the issues raised under the First Amendment were not moot because class members continued to be incarcerated, sustained the Haitian Refugee

> Center's right of access, and remanded the case to review INS' access restrictions in light of its opinion, *id.* at 1509.

On rehearing *in banc*, the court of appeals held that because the government had released detained class members pursuant to the district court's order, the government's appeal of the APA ruling was moot. *Jean V*, 727 F.2d at 962. Without disturbing the factual findings of the panel as to the government's conduct, *id.* at 962, the *in banc* court ruled that excludable aliens seeking admission to this country "have no constitutional rights with regard to their applications," *id.* at 968, and thus could not challenge petitioners' conduct on Equal Protection grounds.

On writ of certiorari, this Court ruled that the court of appeals should not have reached and decided the parole question on constitutional grounds, since plaintiffs had obtained all they sought to obtain by virtue of their statutory argument. *Jean VI*, 472 U.S. at 848, 855. This ruling followed the government's concession before this Court, for the *first time* in the years of this litigation, that race and national origin could not be used as criteria in making parole decisions. *Id.* at 866 n.5 ("Before this Court, the Solicitor General argues that the INS is precluded by statute and regulations from making nationality-based distinctions. At trial, however, the Government argued the opposite. . . . [T]he Solicitor General's representations are flatly inconsistent with the Government's own position at trial; they reflect nothing but a change in the Government's litigation strategy.") (Marshall, J., dissenting).

The government's position in this long and bitter court battle was characterized by the district court as "unusually unwaivering and litigious . . . throughout." *Jean VIII*, Pet. App. at 76a. The district court emphasized in its consideration of the fee application:

> Many of the government's contentions and litigating postures were unwarranted and unnecessarily prolonged the litigation. The government used all of its considerable resources in opposing Plaintiffs' contentions at every turn. From pre-trial discovery, through trial and successive appeals, the government moved for stays of Court Orders, forced repeated applications for emergency relief, put Plaintiffs in a position requiring a brief on all pleaded issues, on every motion, and opposed, in fact as well as in law, each and every important issue asserted by Plaintiffs.



*Id.*, *see also* J. App. at 1-88 (docket sheet).

**B. The Resolution of the Fee Petition**

Respondents filed their initial petition for an award of fees and costs under EAJA in 1982. (Docket entry 501, J. App. at 58.) Over the course of the next three years, the government briefed its strenuous opposition to respondents' eligibility for EAJA fees, arguing repeatedly that respondents were not the prevailing parties and that the government's position had been substantially justified.

On December 6, 1985, the district court resolved the issue of eligibility in favor of respondents. *Jean VII*, Pet. App. at 87a-99a. In ruling that respondents were the prevailing parties, the court found, among other things, that respondents' victory on the APA claim had achieved the two primary goals of the lawsuit: the cessation of mass exclusion hearings being held without counsel and release of class members from detention pending a determination of their political asylum applications. *Jean VII*, Pet. App. at 90a-92a, *quoting Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983) ("[f]or purposes of attorneys' fees, '[t]he result is what matters' "). The court rejected the government's characterization of the relief obtained as technical, partial, or moot, noting that the lawsuit had effectively provided respondents with all of the relief sought in the complaint.[5]

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5 As a direct result of the lawsuit: (1) the government stopped its practice of preventing lawyers from contacting Haitians at closed exclusion hearings (Count I); (2) the court declared the new detention policy "null and void," and released class members from detention, and plaintiffs have been

The district court also rejected the government's contention that its position on the APA claim was substantially justified. The court specifically found that the government's original actions and obstinate defense of these actions throughout the litigation were unreasonable in light of (1) the fact that "the INS was well aware prior to the litigation that the courts in this jurisdiction had consistently rejected the INS' claim that the APA did not apply to changes of substantive policy regarding Haitian refugees;" (2) advice as early as March 20, 1981 from the INS Acting General Counsel that the agency was required to comply with the APA; and (3) the complete rejection of the government's claims in successive decisions of the district court and court of appeals. *Id.* at 93a-94a. The district court made the additional determination that the government's factual position was not substantially justified, observing that "[i]t was only well into the litigation that the defendants admitted what had been obvious—that there was a detention policy and that they had instituted this policy without complying with rulemaking procedures." *Id.* at 94a-95a. The court then found that there were no special circumstances which would make a fee award unjust; rather, "considering the extraordinary efforts of plaintiffs' counsel and the excellent results they achieved, it would be unjust to deny an award of attorneys' fees." *Id.* at 95a.

In connection with the fee application, respondents filed lengthy affidavits detailing the amounts requested and explaining exercises of billing judgment that, among other things, were aimed at minimizing litigation over the amount of the award.[6] The government nonetheless insisted on a evi-

able to retain counsel to advise them on their procedural rights (Count III); (3) denial of access to counsel was cured (Count IV); (4) Haitian exclusion hearings are now open to the public (Count V); (5) plaintiffs effectively obtained the right to apply for political asylum (Count VI); and (6) the government promulgated new parole regulations which are expressly facially neutral (Count VII). *Jean VII*, Pet. App. at 91a n.4.

6 For example, in a 1982 affidavit, Robert E. Juceam, the senior member of the Fried, Frank, Harris, Shriver & Jacobson team, explained that he sought no award for his time so that there would be no dispute as to allocation of his time to activities connected with his role as president of the



dentiary hearing. (Docket entry 582, J. App. at 67). At that hearing, which spanned five days in February and March of 1986, respondents produced for examination by the government several experts and representatives of the law firms or attorneys who had submitted affidavits seeking fees.[7] At the government's insistence, respondents also introduced into evidence thousands of pages of backup documentation for their detailed fees, costs and expenses. (1-10 Resp. C.A. Br. App., Tabs 4-47.) The district court gave the government unlimited opportunity to cross-examine each witness. Moreover, since the hearing was not held on consecutive days and there were gaps of several weeks between sessions, the government had ample opportunity to review and challenge all submitted evidence. *Id.*

The government declined to introduce a single witness or piece of evidence on its own behalf. *Id.* Rather, at the conclusion of the hearing, the government presented once again a lengthy exegesis of its original position on entitlement, *i.e.*, that respondents did not prevail on the merits and that the government's position on the APA was substantially justified.[8] The government did not by way of evidence or argu-

American Immigration Lawyers' Association. (J. App. at 105). In his affidavit Mr. Juceam also pointed out that the firm's initial request of $82,000, which the government opposed, represented approximately a $50,000 discount from the actual fees incurred at that point. (J. App. at 107-08). Respondents' efforts to minimize fee litigation were unavailing. The government has mounted repetitious attacks on the fee request that have served only to multiply the amount of fees for fees and the number of judicial decisions rejecting seriatim identical government objections.

7 Vera Weisz, for example, did not travel between Los Angeles and Miami to write a fee petition as the government now asserts. *See* Pet. Br. at 16 n.17. Rather, she traveled from Los Angeles, where she resides, to Miami, where the court was holding a hearing, to accommodate the government's demand that it be given opportunity to cross-examine the authors of the affidavits submitted in support of the fee petition. The government could have conducted, but did not conduct, any pre-hearing discovery to test this or any other affidavit.

8 These precise arguments had already been rejected by the district court after lengthy briefing. *See Jean VII.* The substantial justification point,

ment then or at any other time assert that its position on fees was "reasonable" or "substantially justified," nor has it ever in any way contested the factual basis for the amount of the fees for fees requested. *Id.*; *Jean VIII*, Pet. App. at 85a.[9]

On August 29, 1986, the district court issued an order on the amount of the fee award that, among other things, "direct[ed] the Plaintiffs' counsel to submit for the Court's review affidavits concerning the fees, costs and expenses incurred in pursuit of attorneys' fees." J. App. at 148. Respondents submitted these affidavits during the first week in September, 1986. J. App. at 165-175. The government submitted no response to these affidavits. J. App. at 78-79. On September 10, 1986, the district court withdrew its August 29, 1986 decision in order to consider the impact of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). J. App. at 176.

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moreover, consisted of little more than reargument of alleged merits of petitioners' view of the governing law, which had already been pressed unsuccessfully before no fewer than four separate courts in litigation on the merits—the district court (*Jean II*), a panel of the court of appeals on application for a stay (*Jean III*), a panel on appeal (*Jean IV*), and the court of appeals sitting *in banc* (*Jean V*). Not a single judge on any of these courts endorsed a single aspect of the government's position. *See also Jean IX*, Pet. App. at 13a-14a ("The government is asking, in essence, that we reweigh the merits of its defense on the APA claim").

9 Nor did any proposed finding of fact or conclusion of law attempt to sustain the government's burden to meet that standard. The government's submissions after the hearings also do not contain a single objection to the amounts of fees for fees involved. During oral argument after close of the hearing on fees, the government only asserted the narrow legal point that no hours should be awarded for the "fee application" if "the government's defense of the fee application was a reasonable one." *See* Pet. Rep. at 1. Similarly, in the proposed findings, the government's sole reference to fees for fees was a proposed conclusion that "[t]ime expended on preparing and pursuing a fee award is not compensable under EAJA unless the government's defense of the fee question is not 'substantially justified.' " *See id.* at 2. Of course, in this Court, the Government has conceded that fees for preparing the fee petition are compensable without a separate "substantial justification" determination. *See* Pet. Br. at 15 n. 17.



On October 1, 1986, the district court issued an amended order which, like the August 29, 1986 order, awarded fees, costs and expenses in an amount substantially less than that requested, compensating respondents for half of the time actually spent on the litigation. *Jean VIII*, Pet App. at 78a.[10] The district court made numerous and detailed findings of fact in applying the variety of tests that are used to limit an award under EAJA to a "reasonable"-amount. Among other things, the court examined each of the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and additional factors that supported an award at an hourly rate exceeding $75.00 and an overall enhancement of the award under *Delaware Valley*, *supra*, *Blum v. Stenson*, 465 U.S. 866 (1984), and *Hensley*, *supra*.

The court also segregated hours attributable to work on respondents' Equal Protection claim under *Hensley*, *supra*, to the extent that this substantive claim was based on different government acts and legal theories and could be treated as if it were a separate lawsuit. With respect to the Equal Protection claim, however, the court awarded fees for 25% of the hours spent on appeal to this Court on the ground that the claim need not have been litigated at all if the government had earlier made the change in its litigation position that it adopted for the first time at oral argument in this Court. *Jean VIII*, Pet. App. at 69a-71a.

On the issue of fees for litigating objections to the fee petition, the court noted that respondents had submitted affidavits detailing these amounts and that:

> None of the fees, costs or expenses have been challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing. As the government has voiced no objection to these fees, costs and expenses and based upon the Court's previous findings under *Johnson* and the other factors enumerated above, which

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10 Although plaintiffs had at that juncture spent nearly 20,000 hours on the litigation, they only requested reimbursement for approximately 11,000 hours, and were awarded fees for approximately 6,000 hours. *See* 1-3, 5 Resp. C.A. Br. App. Tabs 4-5, 7, 9-10, 13-16, 18, 20-30, 37-39; *see also Jean IX*, Pet. App. at 18a.

it incorporates herein, the Court believes these requests are reasonable.

*Id.* at 85a.

Finally, the court enumerated the bases of its factual and legal conclusions as to duplication and documentation of hours, *id.* at 67a-71a, and the recoverability of costs and expenses. *Id.* at 78a-84a.

**C. The Appeal of the Fee Award**

On appeal "the government . . . contested virtually every aspect of the district court's legal rulings and calculations." *Jean IX*, Pet. App. at 7a.[11] In response, the court of appeals affirmed the district court's threshold finding of eligibility. The court of appeals agreed with the district court's finding that respondents were the prevailing parties, dismissing petitioners' attempt to disparage the relief obtained: "we do not think this case is one in which the victory secured was merely technical or formalistic." *Jean IX*, Pet. App. at 23a.[12]

The court of appeals affirmed as well the district court's finding that the government's position was not substantially justified. The court observed that "[i]n disputing the district court's conclusion on the question of substantial justification, the government argues that the district court simply erred with respect to the APA in [the merits litigation]." *Jean IX*,

11 Meanwhile, having ignored the district court's request for submissions as to the scope of relief on remand from the court of appeal's 1984 *in banc* decision on the merits, the government waited until briefing of the appeal of the fee award to seek a writ of mandamus ordering the district court to vacate its injunction with respect to the APA claim. *See* Docket entry 649, J. App. at 75; Docket entry 692, J. App. at 79; Pet. Br. at 6 n.7.

12 After the government's motion for a writ of mandamus was denied, the government appealed the district court's order on remand and ultimately obtained from the court of appeals an order that the injunction be vacated as moot. The court of appeals addressed the government's transparent attempt to use its belated appeal of the continued APA injunction to bolster its position on the "prevailing party" issue on the appeal of the fee award: "[t]his new decision [directing the district court to vacate its motion as moot] adds nothing to the posture of this case." Pet. App. at 9a n.9.



Pet. App. at 13a. The Eleventh Circuit declined to "reweigh the merits of [the government's] defense on the APA claim," *id.* at 14a, stating, among other reasons, that there was a sufficient basis in the record for "[t]he important fact for the district court [, which] was that the defendants willfully ignored the advice of counsel" and observed that "the government's only real response to this point . . . is patently frivolous." *Id.* at 16a. The Eleventh Circuit found support in the record, as well, for the district court's finding that the government unreasonably protracted the litigation. *Id.* at 17a.

Turning to the amount of reimbursable hours, the court of appeals rejected the government's arguments with respect to hours spent on unsuccessful substantive claims, documentation, and duplication of effort. *Id.* at 20a-25a. The only point on which the court of appeals reversed—and indeed the only component of the award that was reversed—was the district court's award of fees for work on appeal to this Court. *Id.* at 18a-20a.

On the subject of hourly rates in excess of $75, the Eleventh Circuit rejected the government's argument that no cost of living adjustment could be made for services performed prior to 1985, and remanded solely for mathematical quantification of the cost of living adjustment. *Id.* at 27a. Similarly, the court agreed with the district court's reliance on the "limited availability of qualified counsel" as a basis for an increase in hourly rates and remanded only for additional findings of fact on this point. *Id.* at 29a.

The court also rejected the government's contention that enhancement was unwarranted. *Id.* at 29a-30a. While it disagreed with the district court's findings that the *pro bono* nature of the case, the vindication of public rights and emotional hardship to respondents' counsel were "special factors" of the type required to support enhancement under *Pierce v. Underwood*, 487 U.S. 552, 109 S. Ct. 2541 (1988), the court of appeals agreed that "the government's unusually litigious position in this case might constitute a special factor" and remanded for additional findings on this point and other "potential special factors that would be consistent with *Pierce*." *Jean IX*, Pet. App. at 30a-33a.

The court of appeals then rejected *in toto* the government's attacks on reimbursement for telephone costs, travel costs, postage costs, computerized research costs, paralegal time, and law clerk time. *Id.* at 33a-37a.

The Eleventh Circuit also rejected the government's attack on the award of fees for fees for work performed before the district court through the decision in *Jean VIII*.[13] Rather, the court adopted the approach taken by the Second Circuit that "the government's position in the fee litigation is irrelevant to a determination whether a successful EAJA fee applicant can claim 'fees for fees'." *Id.* at 39a. In agreeing with this approach, the court of appeals did not simply adopt a rule of convenience to foreclose infinite litigation. Rather, it cited with approval the Second Circuit's analysis of the purpose and operation of EAJA:

> Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as possible. . . . To [accept the government's argument] would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent plaintiff from litigating against the government in the first place.

*Id.* at 40a, *quoting Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 707 (2d Cir. 1987).

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13 There has been as yet no motion for fees relating to post-*Jean VIII* litigation, which has consumed almost four years. By having to litigate extensively the fee petitions, respondents' counsel have had no reimbursements in a case now nine years old with fee and expense reimbursement petitions over eight years old. Even so, there is a prospect of substantial litigation yet ahead on the remand from the circuit court no matter how this Court determines the narrow issue on which petitioners sought certiorari.



Petitioners next sought rehearing *in banc*, which was denied on the ground that "no member of this panel nor other Judge in regular active service on the Court [has] requested that the Court be polled on rehearing in banc." Pet. App. at 103a. Then, although the district court had informed the parties of its desire to proceed expeditiously on remand, the government sought the first of repeated stays of the mandate to permit the Solicitor General to determine whether to file a petition for a writ of certiorari.

Finally, after six months of extensions, in October 1989, the government filed its petition for a writ of certiorari on an issue narrowly framed as follows:

> Whether—in a case where it is determined that the government was not substantially justified on the merits and is therefore liable for fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987)—the government must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.

Pet. at 1.[14]

The petition states as the reason for a writ of certiorari that the court of appeals adopted an erroneous rule on an issue as to which there was conflict in the circuits. Pet. at 10-11. The petition also announces the government's intention to proceed with the fee litigation by piecemeal review of the Eleventh Circuit's decision: "There are several significant errors in the opinion of the court of appeals. We have nevertheless concluded that only one of those errors—the adoption of a 'per se' rule for the award of fees for the fee litigation—

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14 In its brief the government has recast this question to delete any reference to the substantial justification determination that has already taken place. *See* Pet. Br. at (I) ("Whether, in a case where the federal government is liable for attorney's fees under [EAJA] it must automatically pay fees incurred in litigating the fee award without a separate inquiry into whether the government's position in the fee litigation was substantially justified.")

merits this Court's attention *at this time*." *Id.* at 10-11 (emphasis added).[15]

## SUMMARY OF ARGUMENT

The Equal Access to Justice Act ("EAJA") provides that "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by the party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified. . . ." In 1985, the Congress amended EAJA to define the "position" of the United States to include the underlying action of the agency upon which the civil action is based, as well as the government's litigating position in the civil action. 28 U.S.C. § 2412(d)(2)(D).

1. The clear language of the statute rebuts the government's contention that substantial justification can be determined at successive stages in the litigation and that, at the fees for fees stage, the court need only consider the government's litigating position. EAJA nowhere directs a court to determine substantial justification in successive stages of a civil action. It speaks in all relevant sections only of the *position* (not positions) of the United States in the "civil action." 28 U.S.C. §§ 2412(d)(1)(A), 2412(d)(1)(B), 2412(d)(2)(D). The EAJA fee litigation is part of the same "civil action" and it is brought on by a petition for fees in that civil action, not by filing a complaint initiating a new civil action. The determination of substantial justification, therefore, is a threshold determination of eligibility for a fee award, not a substantive condition to be applied after eligibility is adjudicated.

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15 The government asserts as additional errors the court of appeals' affirmance of eligibility (thus renewing for the fourth time in this fee litigation the government's contentions that respondents did not prevail and that the government was substantially justified) and the court of appeals' suggestion that expertise in immigration law and the government's litigiousness might be factors supporting enhancement. Pet. at 10-11 n.10.



Once the substantial justification eligibility requirement has been satisfied, EAJA authorizes an award of "fees and other expenses" for the entire "civil action," subject only to a determination of their reasonableness. Such "fees and other expenses" are defined to include "reasonable attorney's fees," 28 U.S.C. § 2412(d)(2)(A), and such "fees and other expenses" are awardable for the "civil action." The reference to attorney's fees includes fees on fees; that is, compensation for attorney time expended in the same "civil action" in order to establish an entitlement to and the amount of an EAJA award.

Moreover, the government's reading of the statute to require successive substantial justification determinations would contradict the definition of "position of the United States" added by the 1985 amendments to EAJA, which broadened the "position of the United States" to include both the government's litigation position and the underlying agency action. Thus, in order for the government to carry its burden of demonstrating that "the position of the United States was substantially justified," it must demonstrate that both its litigation position and the underlying agency action were substantially justified. When, as here, the underlying agency action is determined to lack substantial justification, eligibility of the plaintiff to an EAJA award of "fees and other expenses" for the entire "civil action" is established without regard to the reasonableness of the government's litigation position. Indeed, since the underlying agency action—the "action or failure to act by the agency upon which the civil action is based" by definition cannot be changed by any action taken by the agency or position asserted by the government after the civil action was filed, any reassessment of the substantial justification question, as the government seeks, could not result in a different conclusion on eligibility for a fee award.

In this case, the government's underlying actions were consistently found to be not substantially justified by every court to address the issue. As the "action or failure to act by the agency" does not change from the first determination of substantial justification, no statutory purpose would be served

by conducting an additional substantial justification inquiry. The government's argument, thus, flatly contradicts the 1985 amendment by eliminating the agency's underlying action as one of the aspects of the "position of the United States" that must be found to be substantially justified.

In addition, if Congress wanted to suggest that district courts should make new substantial justification determinations at various stages of the litigation rather than one initial threshold determination, it knew how to say so. Sections 2412(d)(1)(C) and 2412(d)(2)(D) demonstrate that when an EAJA test may be applied to "stages" of a litigation, the statute so provides.

The plain language of the statute also negates the government's dire prediction of "automatic" fees shifting. This argument ignores the numerous statutory provisions that give the court discretion to limit awards. The section defining "fees and other expenses," for example, states that they shall be "reasonable" and sets forth guidelines as to hourly rates. 28 U.S.C. § 2412(d)(2)(A). The amount of an award is subject, as well, to the discretion of the court to reduce or deny such award if "the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. § 2412(d)(1)(C), or "for any portion of the litigation which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D).

2. The legislative history confirms respondents' reading of the statute and rejects petitioners' efforts to create a separate substantial justification determination for fees where only the litigation position of the United States would be considered. The legislative history clearly provides that the "position" of the United States was defined to expressly eliminate the government's ability to escape liability merely by asserting a reasonable position in the litigation. H.R. Rep. No. 120, *supra*, at 8-14. Senator Charles Grassley, one of the sponsors of the bill containing the 1985 amendments, understood the legislation to prevent the government from making any arguments based solely on its litigation position that would allow it to



escape liability once the agency action was determined not to be substantially justified: "Thus, if the agency action that led to the litigation is not substantially justified, a prevailing party could be eligible for an Equal Access to Justice Act award, irrespective of the merits of the government's argument once they get to court." 131 Cong. Rec. S9992 (daily ed. July 24, 1985).

3. The government's proposed rule would also defeat the clear legislative purpose of EAJA. The purpose of EAJA is to ensure that agencies will be responsible for their conduct and will provide those "with modest means with access to the courthouse door" because "equal justice is not available when one cannot afford to fight." 131 Cong. Rec. S9997-98 (daily ed. July 24, 1985) (statement of Sen. Domenici). This Court recognized that purpose most recently in *Sullivan v. Hudson*, where its conclusion to award attorney fees to a social security claimant for representation provided during administrative proceedings was based in part on its determination that it would "find it difficult to ascribe to Congress an intent to throw the social security claimant a lifeline that it knew was a foot short." 109 S. Ct. 2248, 2256 (1989).

4. In the instant case, fee litigation has gone on longer than the underlying merits of the case. It would clearly be contrary to the purposes of EAJA to allow an agency whose underly ig actions lacked substantial justification to defeat an award of fees for fees by asserting the reasonableness of its litigation posture. This would allow a government agency to bully a litigant into abandoning a claim for costs and fees by using the threat of costly fee litigation that would remain uncompensated if the government's litigation position, even if not successful, is reasonable. It could, as here, through piecemeal litigation and colorable legal arguments, require plaintiffs to fight fee requests for over seven years with little likelihood that attorney fees will be resolved within a decade.

5. The government's suggestion that, alternatively, the Court should adopt the rule stated in *Russell v. Heckler*, 814 F.2d 148 (3d Cir. 1987), *vacated on other grounds*, 108 S. Ct.

2891 (1988), is without merit. The *Russell* rule, like the construction urged by petitioners before this Court, simply rewrites the definition of "position of the United States" contained in the statute to permit the government to assert its litigation position as a sole basis for substantial justification. Congress expressly stated in Section § 2412(d)(2)(D) that the position of the United States refers to both the challenged agency action and the government's litigation position. It is a well-established principle of this Court that "Congress is the body to amend [a statute] and not this Court." *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290, 340 (1897).

6. Finally, the government on this record has waived its opposition to the fee award for the fee litigation. Despite its discussion of various phases of this case, the fee award involved here related only to the fee litigation in the district court. It did not involve any attorney's fees for respondents' legal work on the fees appeal. In the district court, the government did not contest the fee amount and does not contest that amount in this Court. Moreover, even assuming that the government's position that a new substantial justification inquiry was required is correct, the government failed altogether to present any evidence or put forth any argument to meet its burden of proof to establish that its position was substantially justified. Because both the clear language of the statute and *Pierce* place the substantial justification burden on the government, the district court's finding of waiver is clearly correct. As a result, the issue on which certiorari was granted is not presented by this record, and the writ should be dismissed as improvidently granted.

## ARGUMENT

Nine years ago, in 1981, the government engaged in conduct towards respondents that no fewer than five times since has been ruled indefensible and three times more to have been not substantially justified. *See Jean I*; *Jean II*; *Jean III*; *Jean IV*; *Jean V*; *Jean VII*; *Jean VIII*; *Jean IX*. A year and a half later, respondents obtained a favorable judgment at trial



and sought fees under EAJA in an amount of approximately $500,000. 3 Resp. C.A. Br. App., Tabs 9-10, 13-14, 18, 20-21, 23-25. The government opposed the fee petition and forced respondents to defend the judgment on the merits, at a cost to respondents of an additional $1,000,000,[16] through successive appeals and corollary proceedings that in no way disturbed the outcome of the trial on the merits. *See Jean VIII*, Pet. App. at 55a; *see also Jean I*; *Jean II*; *Jean III*; *Jean IV*; *Jean V*.

Defense of the fee petition in this action has now lasted nearly twice as long as litigation on the merits. Yet the present posture of the fee petition differs from its posture in 1982 in only two respects: respondents have now obtained three successive judicial rulings rejecting the objections asserted by the government in 1982, and the fees for fees are correspondingly higher. *See Jean VII*; *Jean VIII*; *Jean IX*. The government's so-called victories in the fee litigation have done little more than reduce or threaten to reduce the award by dollar amounts that have been incurred for the most part since 1982, and that are in any event smaller than the undisturbed fees that have accrued in litigation that the government has pressed to no advantage since 1982.[17]

Now the government has announced its intention to proceed with piecemeal review of the decision below, and has not sought review "at this time" (Pet. at 10-11) of other matters it asserts are "errors."[18] It has, moreover, chosen

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16 These figures do not take into account the amounts voluntarily excised by counsel in an effort to minimize litigation over fees or otherwise. *See, e.g.*, J. App. at 107-08 (Juceam Affidavit).

17 The Supreme Court fees that were deleted by the court of appeals were not incurred until 1984-85. If the government were to succeed on remand or further appeal in erasing entirely the enhancement and hourly rates higher than $75 (and it did *not* do so in the court of appeals) the resulting reduction would leave undisturbed an award (including interest but not "fees for fees") of $800,000. *See Jean VIII*, Pet. App. at 74a, 84a.

18 Of the other three asserted "errors," one (on the issue of what constitutes a "special factor" justifying enhancement) bears directly on the fact finding that has been ordered by the court of appeals, and the other two (on)

to frame this "error" as a narrow legal issue—whether a standard exists—that will then enable the government to litigate through the courts once again on the question of whether the government has met that standard.[19] There is no conceivable economy or rational litigation purpose to be served by this appeal. The government's announced strategy of piecemeal review will simply prolong to the maximum degree final resolution of a fee request that has now been pending for eight years.

The government's posture in this lawsuit and on this appeal epitomize the abuses Congress sought to correct in enacting EAJA and demonstrate the patent incompatibility with EAJA of the self-serving "rule" that the government urges here. The government's argument—that a substantially justified litigation position in opposition to a fee petition should defeat an award of fees for fees—distorts the plain language of EAJA, defies the express intent of the legislature, and thwarts the public policies embodied in the statute and enunciated by this Court. The prevailing view in the circuits—that an award of fees for fees requires no independent inquiry into the substantial justification of the government's "position" with respect to fees—is correct and should be affirmed.[20]

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the issues of "substantial justification" and "prevailing party"), if they had been appealed to this Court and resolved in favor of the government, would have alleviated the need for any further proceedings. Manifestly, the government would rather litigate the "substantial justification" and "prevailing party" issues *sub rosa*, as it does on this appeal, rather than risk immediately a fourth and final rejection of its arguments.

19 By framing the question inappropriately as a purely legal issue, the government also uses the opportunity to structure its case here in terms of an entirely hypothetical "reasonable" position on fees.

20 The court below followed the approach of the Second Circuit in *Trichilo*, *supra*, which reasoned that the central purpose of EAJA would be undermined if the government could threaten the sanction of unreimbursed fees for endless defense of the fee application. The rule that there is no separate "substantial justification" inquiry for "fees for fees" has also been followed by the First and Fifth Circuits. *See Powell v. Commissioner*, 891 F.2d 1167 (5th Cir. 1990), *reh'g denied*, (Feb. 14, 1990); *McDonald v. Secretary of Health & Human Services*, 884 F.2d 1468 (1st Cir. 1989). The D.C. Circuit "indicated a preference" for this rule, but suggested an exception for "technical defense[s]" such as late filing. *See American Academy of Pediatrics v. Bowen*, 795 F.2d 211, 213 (D.C. Cir. 1986).

The Seventh and Eighth Circuit cases cited by the government for the proposition that a separate substantial justification inquiry is required were decided prior to the 1985 amendments, which, as set forth below, preclude such review. *See Cornella v. Schweiker*, 741 F.2d 170 (8th Cir. 1984); *Continental Web Press, Inc. v. NLRB*, 767 F.2d 321 (7th Cir. 1985). The Ninth Circuit has applied a substantial justification test to fee litigation without considering the significance of the 1985 amendments. *See National Wildlife Fed'n v. Federal Energy Regulatory Comm'n*, 870 F.2d 542, 547-48 (9th Cir. 1989).

In *Russell v. Heckler*, 814 F.2d 148, 155 (3d Cir. 1987), *vacated on other grounds*, 108 S. Ct. 2891 (1988), the court adopted a compromise position, stating that the government will almost always be substantially unjustified in opposing fees on the ground that the initial substantial justification review was erroneous, but permitting substantial justification review of other objections to fees.



## I. THE PLAIN LANGUAGE OF EAJA PRECLUDES REVIEW OF THE "SUBSTANTIAL JUSTIFICATION" OF THE GOVERNMENT'S "POSITION" ON FEES

The plain language of EAJA rebuts the government's claim that the court must examine the "substantial justification" of the government's "position" on fees before it may award "fees for fees." The statute's "substantial justification" test is stated in 28 U.S.C. § 2412(d)(1)(A), which provides that a prevailing party shall receive fees unless the government meets this burden:

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

EAJA nowhere directs a court to repeat this inquiry as a predicate to an award of fees for the fee litigation. Indeed,

the statute does not distinguish fee litigation from the rest of the civil action for any purpose.[21]

To the contrary, the statute clearly sets forth the "substantial justification" test as a threshold to eligibility that by its terms cannot be repeated at the "fee litigation" or any other stage of the case. Once the government has failed to prove that its conduct in violating the prevailing party's rights was substantially justified, the prevailing party is entitled to all reasonable fees incurred in vindicating those rights. These fees are limited by other provisions of EAJA that the government deliberately ignores in its parade of horribles about the "automatic" fee shifting that will occur in the absence of repeated "substantial justification" review. The statute more than adequately protects the government with provisions that are designed for that purpose. *See* 28 U.S.C. § 2412(d)(1)(C) and (d)(2)(D), discussed, below. The rule proposed by the government distorts the clear language and function of the

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21 The government's deduction of such a distinction from the statutory definition of fees is spurious. "Fees and other expenses" are defined to include:

> the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

28 U.S.C. § 2412(d)(2)(A).

The government infers from this definition that fees for fees are not "necessary for the preparation of the party's case" and therefore require separate treatment. *See* Pet. Br. at 17-18. This argument ignores the plain language of the statute (which qualifies *costs* with the phrase "necessary for the preparation of the party's case" and *fees* with the adjective "reasonable"). It also begs the relevant question: whether fee litigation is part of the case. The government concedes that issue; indeed, without this concession it could not press the question it has framed for this Court. *See* Pet. Br. at 17 ("[f]ee litigation is nevertheless part of the 'civil action,' and the 'substantial justification' requirement therefore applies in full.")

Moreover, the government's distinction between "fees for litigating the merits" and "fees for fees" is contradicted by the government's distinction elsewhere between fees for preparing an application, which it concedes are "part of the award on the merits," and fees for litigating objections to their application, which it asserts are not. *See* Pet. Br. at 9-11 and n.11.



"substantial justification" requirement and renders these other provisions superfluous.[22]

In awarding fees under EAJA, a court determines eligibility for the fee award as a whole by reviewing the position of the United States for substantial justification—an inquiry that can only be made once. A court is not directed to—and may not—review the "substantial justification" of the government's "position" at successive "phases" of the civil action. This conclusion is implicit in the reference in Section 2412(d)(1)(A) to "*the* position the United States" and it is made explicit by Section 2412(d)(2)(D), which defines "position of the United States" to mean "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." This definition requires the court to focus on the government conduct that forced the prevailing party to incur legal fees and does not permit the government to escape or limit those fees through assertion that one or another isolated litigation position was substantially justified.

Where, as in this case, the "agency action" that gave rise to the lawsuit was not substantially justified, the government cannot meet its burden. Even in the case not before this Court, where the government's pre-litigation conduct was justified, the prevailing party can cross this threshold if it is shown that "*the* position in . . . the civil action" was not substantially justified, i.e., that the government's defense of its conduct as a whole was unreasonable. There is no room in this definition for parsing the government's litigation position in stages. This clear focus on the government's overall position demonstrates that the government's inability to prove that it was "substantially justified" in forcing the prevailing party to redress its rights in court is a *threshold* to eligibility for the cost of vindicating those rights. It is not, as the government asserts, a mechanism for limiting the amount of that

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22 We note that the government did not consider 28 U.S.C. § 2412(d)(1)(C) or the second clause of 28 U.S.C. § 2412(d)(2)(D) to be "relevant statutory provisions" and does not mention them in its brief. *See* Pet. Br. at 2-3.

cost. The mechanisms for limiting the amount of an award are clearly set forth elsewhere in the statute.

The procedural section of EAJA, 28 U.S.C. § 2412(d)(1)(B), underscores the "substantial justification" test's function as an eligibility threshold and precludes repeated application of that test at successive "stages" of a civil action. This section not only directs an EAJA applicant to allege a lack of substantial justification as a predicate to an award of fees, but also precludes review of an isolated litigation position by requiring the court to review the entire record, including the record on the underlying act in ruling on that allegation:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award. . . . *The party shall also allege that the position of the United States was not substantially justified.* Whether or not the position of the United States was substantially justified *shall* be determined on the basis of the record (*including the record with respect to the action or failure to act by the agency upon which the civil action is based*) which is made in the civil action for which fees and other expenses are sought.

(emphasis added).[23]

The government's "position" at one phase or another of a civil action is by definition purely a litigation position. No new agency act arises from one phase to another; the entire civil action arises from the same underlying act. Thus, there simply does not exist a new "position," as that term is—defined in Section 2412(d)(2)(D) to review at different "phases" of the litigation in the manner in which Section 2412(d)(1)(B) says a court must, unless the court re-evaluates the underlying act in the context of different litigation positions. This is manifestly illogical; the underlying agency act is

23 The government apparently did not consider this section of EAJA to be a "relevant statutory provision" either, (see Pet. Br. at 2-3), and does not mention it in its brief.



either substantially justified or it is not. This type of repeated "substantial justification" determination is also at odds with the plain language of the statute, which speaks of a review of "the position" of the United States on the basis of "the record." *See* 28 U.S.C. § 2412(d)(1)(B).

The government's "position" in the fee litigation, as at any other stage, is purely a litigation position. The fee litigation manifestly arises from the "action or failure to act by the agency upon which the civil action is based." *See* 28 U.S.C. § 2412(d)(2)(D). Although new factual and legal issues are introduced at the fee stage of the "civil action," as at any identifiable "stage" of litigation, the only new agency act introduced at that stage is the action of the government's litigators in drafting and filing objections to fees and the various motion papers and briefs that prolong these objections. Indeed, the government concedes that the fee litigation is a "part of the 'civil action' " under EAJA, *i.e.*, part of the litigation that flows from the initial agency act. *See* Pet. Br. at 17. Thus, the "substantial justification" test by its terms cannot be repeated as a statutorily mandated predicate to "fees for fees."[24]

24 This "substantial justification" requirement thus obviously is not susceptible by analogy to the treatment of the "prevailing party" requirement set forth in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). *See* Pet. Br. at 13, 29. When, as in *Hensley*, "distinctly different claims for relief . . . are based on different facts and legal theories" it does no violence to a requirement that a party "prevail" to treat "these unrelated claims as if they had been revised in separate lawsuits." 461 U.S. at 434-35. Procedural "phases" of a civil action are not analogous to separate lawsuits for the purpose of determining whether the government was justified in precipitating that lawsuit. If a party does not prevail on a claim that can be completely segregated from the rest of the lawsuit, there is no further inquiry to be made under the EAJA. Where, however, the party prevails and establishes that the government was not substantially justified in forcing the party to vindicate its rights in court, severing a "phase" of the litigation would serve only to nullify a determination previously made. We note that *Porter v. Heckler*, 780 F.2d 920 (11th Cir. 1986), which the government cites for its assertion that *Hensley* is applicable by analogy, was overruled by the court in *Haitian Refugee Center v. Meese*, 791 F.2d 1489, 1497 n.8 (11th Cir. 1986), *vacated in part, reh'g denied*, 804 F.2d 1573 (11th Cir. 1986) (en banc) where the court

The government's dire predictions of "automatic" fee shifting that will result if "substantial justification" review is not repeated at each phase of the case, *see*, *e.g.*, Pet. Br. at 12, 16-17, 19, 21, 25, 27-31, deliberately misrepresent the plain language of the statute by omitting all reference to EAJA provisions that directly address the issue of exorbitant fees and excessive or frivolous conduct on the part of a prevailing party. The government is already protected by EAJA provisions that direct the court to reduce or deny an award if "the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. § 2412(d)(1)(C), or "for any portion of the litigation in which the party has unreasonably protracted the proceedings." 28 U.S.C. § 2412(d)(2)(D). The court is also constrained to apply an overarching "reasonableness" test and to consider guidelines as to hourly rates. 28 U.S.C. § 2412(d)(2)(A). Thus, if a claim for fees for fees is unreasonable, the hours claimed on the rate of compensation can be reduced by the court's determination of a "reasonable attorney's fee." By pretending that these limitations do not exist and raising the specter of abuse, the government tries to make a case that "substantial justification" review should be used in their place. The government's proposed rule would amend the statute by adding requirements that do not exist and would render superfluous those that do.

stated that it did "not consider *Porter* to be a binding precedent" because in *Porter* the court "relied on the definition of 'position of the United States' which includes only the government's litigation position" and did not consider the "1985 amendments to the EAJA," which expand that definition. It is surprising that the government would even suggest application of *Hensley* to the present set of facts, *see* Pet. Br. at 20, since *Hensley* clearly does not permit the sort of hairsplitting the government seeks here. The government repeatedly heralds its "victories" in this fee litigation, without acknowledging that: (1) it utterly failed in its primary goal, which was to overturn the award in its entirety, and (2) its so-called meritorious contentions have reduced or threaten to reduce the award by amounts that are minor in comparison with the entire award and with the fees that the government has caused to accrue since the petition first was made. Even under *Hensley*, "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention . . . . The result is what matters." 461 U.S. at 435.



The government's repeated warnings about an "automatic award of fees for fees" also ignore the "substantial justification" test's function as a threshold to eligibility for an award. Once the "substantial justification" eligibility requirement has been satisfied, EAJA authorizes an award of "fees and other expenses" for the entire "civil action," subject only to a determination of their reasonableness. Such "fees and other expenses" are defined to include "reasonable attorney fees," 28 U.S.C. § 2412(d)(2)(A), and since such "fees and other expenses" are awardable for the "civil action," the reference to attorney fees includes fees on fees, i.e., compensation for attorney time expended in the same "civil action" in order to establish an entitlement to, and the amount of, an EAJA award.

The sections that relate to the prevailing party's position, which require the court to examine "portions" or "phases" of the litigation further underscore the conclusion that the "substantial justification" test, which contains no such language, may not be applied to isolated segments of the civil action. Section 2412(d)(1)(C) directs the court's attention to the prevailing party's conduct "during the course of the proceedings," which Section 2412(d)(2)(D) defines as "any portion of the litigation." If the court determines the party "unreasonably protracted the proceedings" during "*any portion* of the litigation," it may reduce or deny the fee award. *Id.* (emphasis supplied). The "substantial justification" test, in contrast, does not direct the court's attention to the "position" taken by the government in the fee portion of the litigation or any other discrete portion of the litigation. In stating the "substantial justification" test, EAJA directs the court to "*the* position of the United States," 28 U.S.C. § 2412(d)(1)(A) (emphasis added), and "*the* position taken . . . in *the civil action*." 28 U.S.C. § 2412(d)(2)(D) (emphasis added). Sections 2412(d)(1)(C) and 2412(d)(2)(D) demon-

strate that when an EAJA test may be applied to "stages" of a litigation, the statute says so.[25]

## II. THE LEGISLATIVE HISTORY DEMONSTRATES THAT THE SUBSTANTIAL JUSTIFICATION TEST CANNOT BE APPLIED TO ISOLATED STAGES OF LITIGATION INCLUDING THE FEE STAGE

The government's repeated assertion that the rule applied below will upset the "careful balance" that Congress established in EAJA is a ludicrous interpretation of legislative history that states as the sole purpose of EAJA the expansion of government liability to curtail government abuse:

> The concept of the bill is simple. Through the device of fee-shifting, the bill attempts to overcome the financial obstacles which prevent citizens from . . . challenging the unreasonable exercise of government authority . . . . [T]he purpose of this bill is not only to compensate . . . the victims of arbitrary government actions. It is also intended to affirmatively to encourage citizens to challenge actions which they believe to be unreasonable and irresponsible.

125 Cong. Record S10914 (daily ed. July 31, 1979) (statement of Sen. DeConcini).

The rule applied by the court below—that the government's litigation position cannot be asserted as a defense to fees on fees—not only comports with EAJA's overriding purpose to provide litigants against the government with the means to vindicate their rights, it does so in a manner that the legislature expressly commanded when it amended EAJA

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25 The contrast is highlighted by the fact that both treatments are contained in one paragraph of EAJA, which states them in the disjunctive:

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings[.]

28 U.S.C. § 2412(d)(2)(D).



in 1985. The legislative history of those amendments repeatedly and emphatically condemns the government's attempt to limit or escape EAJA awards by asserting a reasonable litigation position. Congress states that the express purpose of the amendment is to *foreclose* the abuse of the "substantial justification" standard that the government proposes here.

In 1985, the House of Representatives reported that awards under EAJA were "dramatically less-than the $100 million annual cost estimated by the Congressional [Budget] Office . . . and higher amounts predicted by the Justice Department." H.R. Rep. No. 120, *supra*, at 9. Congress found that "[p]art of the problem in implementing the Act has been that . . . courts are misconstruing the Act." *Id.*

The "misconstruction" that concerned Congress was the precise construction urged by the government here—that the "substantial justification" of a litigation position can defeat an award of fees incurred in litigation arising from an unjustified agency act:

> In clarifying the "position" term, *the Committee expressly rejects the holding* [citation omitted] that the only government "position" to be scrutinized in the context of an EAJA case is that taken in the litigation itself.

H.R. Rep. No. 120, *supra*, at 12 (emphasis added).

To foreclose this erroneous interpretation of EAJA, Congress amended the statute to add: (1) 28 U.S.C. § 2412(d)(2)(D), which defines "position of the United States" to include "the action or failure to act by the agency upon which the civil action is based," and (2) the final sentence of 28 U.S.C. § 2412(d)(1)(B), which directs a court making a determination of the "substantial justification" of the "position of the Unites States" to review "the record with respect to the action or failure to act by the agency upon which the civil action is based."

The legislative history of the amendments to EAJA demonstrates that the operation of the "substantial justification" test as a threshold eligibility standard as set forth in Point I, *supra*, is exactly what Congress intended. Congress stated

that the 1985 amendments were intended to direct a court to review the act underlying the litigation when determining whether the government's position was substantially justified:

> The Committee's clarification of the "position" term is intended to broaden the court's . . . focus of inquiry for EAJA purposes beyond mere litigation arguments, *and to require an assessment of those government actions that formed the basis of the litigation.* We believe this conclusion is implicit in the EAJA definition of the term "United States," which "includes any agency and any official of the United States acting in his or her official capacity" . . . *rather than merely the position taken by the government's lawyers.*

H.R. Rep. No. 120, *supra* at 12-13 (emphasis added).

Congress further stated that it intended through this clarified focus to foreclose the government from asserting a "reasonable" litigation position as a defense to fees incurred in contesting unjustified government action. Since the purpose of EAJA is to remove the "economic deterrent to contesting government action" that lies in "the expense involved in securing vindication of . . . rights," S. Rep. No. 253, 96th Cong., 1st Sess. 1 (1979), the statute is a nullity if an EAJA litigant who has been aggrieved by unjustified governmental action can be forced nonetheless to bear the cost and fees of vindicating his or her rights because conduct of the government in court was reasonable. Thus, Congress emphasized:

> The issue is whether the United States may be relieved of liability to pay attorney's fees and reasonabl[e] expenses merely by showing its position 'as a party' in an adversary adjudication or court proceeding was 'substantially justified.' . . . . [T]he amendment will make clear that Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation and the agency then rides to avoid such liability by reasonable behavior during the litigation.

H.R. Rep. No. 120, *supra*, at 11.



Conversely, Congress observed that it is no great "incentive to careful agency action," *see* H.R. Rep. No. 120, *supra* at 12, if liability for all or part of the cost of contesting that action can be evaded by the reasonable conduct of the government's litigators. According to Senator Charles Grassley, one of the sponsors of the bill containing the amendments,

> The bill . . . states clearly that when deciding whether a prevailing party shall be awarded fees, a court . . . shall evaluate both the Government's arguments made in the litigation and the agency action that made it necessary for the private party to seek relief. *Thus, if the agency action that led to the litigation is not substantially justified, a prevailing party could be eligible for an Equal Access to Justice Act award, irrespective of the merits of the Government's arguments once they get to court.* That is because the purpose of the Equal Access to Justice Act is to make Government bureaucrats think long and hard before they start an enforcement action. The focus of the Equal Access of Justice Act is not on making Government litigators behave once in court.

131 Cong. Rec. S9992 (daily ed. July 24, 1985) (emphasis added).[26]

As set forth by Congress, then, once the prevailing party has crossed the "substantial justification" threshold by establishing that the agency action underlying litigation was unjus-

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26 Senator Grassley continued by saying:

> Consistent with the general rule that successful litigants are ordinarily entitled to fees for their litigation of the fee application, a prevailing Equal Access to Justice Act party is eligible to recover attorney's fees for the fee litigation itself, subject to the Equal Access to Justice Act's terms, in any case in which the Government's position in the case, as defined in the bill, was not substantially justified.

131 Cong. Rec. S9992 (daily ed. July 24, 1985). The context demonstrates the legislature's specific intent to treat fee litigation like any other stage of a civil action that has arisen from an unjustified agency act, *i.e.*, to preserve an award of fees for that component regardless of the "reasonableness" of the government's litigation position. In this context, it is not necessary to guess—as does the government—what Senator Grassley's remarks "apparently contemplate." *See* Pet. Br. at 25 n.26.

tified, the ensuing entitlement to the cost of that litigation cannot be defeated by the government's assertion that its litigation position was "reasonable."

*A fortiori*, the government cannot limit those fees by asserting that it's position at an allegedly segregable stage of litigation defeats fees for that stage. Since the government's position at any segregated "stage" of litigation is purely a litigation position, there would be no "focus . . . on the unjustified government activity that formed the basis of the litigation," and the application of the substantial justification test would "result in the denial of . . . meritorious fee claims." H.R. Rep. No. 120, *supra*, at 12.

The government's primary response to this legislative history is that Congress intended that a prevailing party who crossed the threshold of demonstrating "unreasonable agency action" would be entitled thereby to the fees for "establishing that the underlying agency action is unlawful" only in some initial proceeding such as "fil[ing] a complaint." *See* Pet. Br. at 23. The government asserts that a "separate 'substantial justification' inquiry" is required for all "subsequent distinct stages in the litigation." *Id.* While the government does not provide an exhaustive list, it identifies at least three subsequent stages: "defining the appropriate relief to be awarded, . . . litigating appeals, [and] determining the availability and amount of attorney's fees." *Id.* This argument has no foundation in the legislative history or statutory text.

The government's argument that EAJA requires "substantial justification" review at successive stages flatly contradicts the explicit Congressional directive that a litigation position may not be reviewed in isolation. There is no difference between the government's "position" at trial and its "position" on appeal, to use one of the government's examples, other than the difference, if any, in "the position taken by the government's lawyers." *See* H. R. Rep. No. 120, *supra* at 12. By definition, each of these stages, like every stage of a given civil action, including defense of the fee application, flows from the same underlying agency act. Thus there is no way to use a "substantial justification" test to deny fees for an individual "stage" of a litigation without applying that



test to the government's litigation position in isolation from the underlying agency act.[27]

Moreover, Congress clearly envisioned that a prevailing party generally need do more than "file a complaint" to vindicate his rights. In enacting EAJA, Senator Goldwater described in detail the circumstances EAJA was intended to remedy:

> As high as . . . attorneys' fees may be at the trial level, a private citizen who wins his case there against the government and then is forced to defend his judgment in an appellate court after the Government appeals, cannot be reimbursed even when that person succeeds a second time upon appeal . . . . [S]hould the Government, with all its resources, choose to appeal a second negative decision up to the Supreme Court, then the private party must once again bear the entire burden out of his own pocket in order to pay the costs of counsel at this highest judicial level. Thus, a private individual or business could prevail three times in a case against the Government, and yet, never once could he recover the actual legal fees he has suffered to uphold his rights.
>
> [T]his glaring inequity of current law is an encouragement to governmental arbitrariness. What hope does a small citizen or business have to challenge all the

27 The government's bald assertion that "[f]ee litigation is different from litigation over the merits; the issues presented are not the same" (Pet. Br. at 17) does not warrant, much less compel, the distinction sought. This functional difference is true at any identifiable "stage" of litigation. Pre-trial discovery, for example, may involve unique factual issues (*e.g.*, availability or harassment of witnesses) and unique legal issues (*e.g.*, the permissible scope of discovery). Moreover, the so-called "new" issues at the fee litigation stage are inextricably interwoven with the factual and legal issues that are raised in the merits. In the fee litigation at bar, for example, the government has now asked courts three times to reweigh the merits of its arguments on the APA claim (*see Jean IX*, Pet. App. at 13a-14a), and finds it necessary to include in every brief a detailed exposition of the claims set forth in respondents' complaint. (*See e.g.*, Pet. Br. at 4-5 and n.4) The relevant fact is that the fee litigation involves no new underlying agency act.

> resources of the mighty Federal Government when even if he wins this administrative or judicial decision, his legal fees virtually leave him in bankruptcy.

125 Cong. Rec. S10917 (daily ed. July 31, 1979.) It is a sheer misstatement of this legislative history, and of the reality of the problems EAJA was designed to correct, to assert that the amendments to EAJA were only intended to secure for applicants the cost of "fil[ing] a complaint" or "negotiat-[ing] a settlement" and that all "subsequent" litigation costs could be subject to the reasonableness of the government's litigation position. *See* Pet. Br. at 23.

The government's argument that it should be allowed to limit fees through application of the "substantial justification" test rests, in the end, on its repeated assertion that Congress could not have intended to shift them "automatically" and without limit on amount. We can only assume that the government is unaware that limits on amounts are explicitly set forth in EAJA—and not in the "substantial justification" test. *See* 28 U.S.C. § 2412(d)(1)(C), (d)(2)(A), and (d)(2)(D).

Adopting the interpretation of EAJA urged by petitioners would simply require district courts to engage in a time consuming and ultimately meaningless exercise. To award a prevailing party its attorney's fees, the district court would first be required to find that the position of the United States—including the agency action giving rise to the litigation—was not substantially justified. When the prevailing party then applied for an award of fees for fees, the position of the United States (consisting of both the agency action and the government's litigation position on the fee application (28 U.S.C. § 2412(d)(2)(B)) would be reviewed for a second time. Since the lack of substantial justification for the agency action would now be law of the case, only the government's litigation position should be reviewable. And since Congress has made it emphatically clear in 28 U.S.C. §§ 2412(d)(1)(B) and (d)(2)(D) that a reasonable litigation position standing alone will not defeat an award of fees, subjecting an application for an award of fees for fees to substantial justification



review would be futile since the government should never succeed in defending against the application on this ground. The government will have succeeded only ensuring that the fee request "result[ed] in a second major litigation." *See Hensley*, *supra*, at 427.

## III. REVIEW OF THE SUBSTANTIAL JUSTIFICATION OF THE GOVERNMENT'S POSITION ON FEES WOULD COMPLETELY DEFEAT THE LEGISLATIVE PURPOSE

Even without Senator Grassley's explicit acknowledgement, it is obvious from the legislative history that a rule limiting access to fees for fees in the manner proposed by the government would completely defeat the statutory purpose. In enacting EAJA Congress recognized that the prohibitive cost of litigating against the government would simply compel an economic decision that the cost outweighed the benefits. Congress specifically sought to prevent the government from coercing compliance through this show of brute strength:

> It is clear that when the cost of contesting a government action exceeds the amount at stake, the economically practical choice is to settle, compromise or acquiesce, even if one believes the government to be unreasonable. . . . Government, by coerced acquiescence, is certainly inconsistent with a jurisprudential tradition which relies on the free and open exchange of opposing ideas in an adversarial process in order to insure legitimacy of the law.

*Award of Attorneys' Fees Against the Federal Government, Hearings on S. 265 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee of the Judiciary*, 96th Cong., 2d Sess. 23 (1980) (statement of Sen. DeConcini); *see also* S. Rep. No. 253, *supra* at 5.

It would clearly be anomalous to preclude the government from asserting its reasonable litigation posture as a defense to the cost of litigating the merits of a civil action, and then

permit it to bully that litigant into abandoning an award of those costs with the specter of costly fee litigation that will go unreimbursed if the government's litigation position, even if not victorious, is "reasonable." *Trichilo*, *supra*, at 707. As the government itself has elsewhere argued to this Court:

> The prospect of lengthy and unpredictable litigation about the availability of fees may make it impossible for persons interested in contesting government action to gauge the likelihood of a fee recovery. That uncertainty, and the expense associated with resolving it, may discourage challenges to unjustified government action.

Brief for the Petitioner, *Pierce v. Underwood*, 108 S. Ct. 2541 (1988) (available on LEXIS, Genfed library, Briefs file).

This Court has cautioned that "we must endeavor to interpret the fee statute in light of the statutory provisions it was designed to effectuate" and not "ascribe to Congress an intent to throw the . . . claimant a lifeline that it knew was a foot short." *Sullivan*, *supra* at 2256. Like the fees on administrative remand at issue in *Sullivan*, fees for defending objections to the fee application are "crucial to the vindication of [respondent's] rights," *id.*, citing *Delaware Valley*, *supra*, since "no fee award at all would [be] available to respondent[s] absent [their] successful conclusion." *Id.* While the government does not contend here that fees for fees are *per se* unreimbursable, it seeks to limit access to them in a manner that is not only at odds with legislative history that forbids assertion of a litigation position as a defense to fees, but that would defeat the central purpose of the statute by substituting the specter of unreimbursed fee litigation for the specter of unreimbursed litigation on the merits. The Court's conclusion in *Sullivan* is particularly apt here:

> Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it.

109 S. Ct. at 2256.

The government does not even argue that fees for fees are not necessary to vindication of EAJA rights; rather, it has



the arrogance simply to assure the Court that the fundamental premises of EAJA that were embodied in the 1985 amendments are irrelevant to securing a fee award because the government will behave itself:

> It is of course true that conducting a separate inquiry into the reasonableness of the government's position in the fee portion of the case may result in a prevailing party not receiving compensation for all of its litigation expenses.
>
> * * *
>
> This does not mean that prevailing parties will be given a life line that is "a foot short" [citation omitted]. If the prevailing party makes a fee request that is reasonable, the government should ordinarily be expected to go along with it. . . .

Pet. Br. at 27 and n.28.

Obviously, as an academic and policy matter the government "should be expected to go along" with a reasonable fee request. In practice, the government does not, as the record in this case amply demonstrates. It is precisely because the government treats such requests adversarily that EAJA's protections were enacted. What the government seeks is that this Court, essentially as a legislative matter, revise EAJA to its litigation benefit. The principles enunciated in *Sullivan* compel a contrary ruling that preserves the protections embodied in EAJA.

## IV. THE GOVERNMENT STATEMENT OF POLICIES EMBODIED IN EAJA IS SPURIOUS

In seeking to have this Court give it what EAJA does not, the government presses a number of imaginative arguments based on alleged public policies ostensibly embodied in EAJA. Foremost among them is that the rule adopted below might chill government litigators' ability to "vigorously discharg[e] their responsibilities" to "resist . . . exorbitant fee requests." *See* Pet. Br. at 21; *see also* Pet. Br. at 20. No such chill is apparent on the record here. Moreover, this argument

is patently absurd in the face of the legislature's express intent to prevent the government's reasonable litigation position from diminishing the liability triggered by unreasonable agency action. *See*, *e.g.*, Remarks of Senator Grassley, 131 Cong. Rec. S9992 (daily ed. July 24, 1985) ("if the agency action . . . is not substantially justified, a prevailing party could be eligible for an . . . award *irrespective* of the merits of the Government's arguments once they get to court.") (emphasis added).

Nor does the absence of a reward for asserting reasonable litigation positions result in any "tax on government efforts to advance reasonable litigating positions," *see* Pet. Br. at 21, or chill the government's ability "to carry out its duty to protect the public fisc." Pet. Br. at 27. To the contrary, since an agency that acts unjustifiably will pay for the cost of litigation regardless of the conduct of its litigators, the way for those litigators to protect the public fisc is by advancing reasonable litigation positions on the underlying merits and thereby minimizing the need for, and the expense of, litigation "in the civil action."

Moreover, fees for fees, like the entire fee award, are subject to the statute's overarching reasonableness test. Nothing in the rule adopted by the court below precludes a court from reducing a fee request on the ground that it is not reasonable, as the cases awarding reduced fees cited by the government in its own brief illustrate. *See* Pet. Br. at 20 n.21. Similarly unavailing is the government's lament that under the rule adopted by the court below, it will be required to pay fees for fees "even though the government in fact prevailed" on certain issues before the Eleventh Circuit. Pet. Br. at 19-20. The government is deliberately obscuring the fact that the court of appeals affirmed an award of fees for fees for work performed before the *district court*—the amount of which was never challenged by the government.[28] On remand, the

28 "None of the fees [for fees], costs or expenses [were] challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing" and the district court expressly found the amount of the requests to be "reasonable." *Jean VIII*, Pet. App. at 85a.



government will be free to argue that it would not be reasonable within the meaning of the EAJA to award respondents fees incurred before the court of appeals (which are not part of the record before this Court), for time spent there litigating unsuccessful claims to attorney's fees.

The government also expresses concern for agencies with small appropriations which might find the possibility of large EAJA awards "particularly troubling." *See* Pet. Br. at 21 n.22. But this is not an argument against a reasonable award of fees for fees or a rule of substantial justification to be created by judicial fiat—it is an argument for repeal of the EAJA and has been expressly rejected:

> If the Attorney General has the guts to come in here and argue, as one of their representatives did in my office, "It's going to cost a lot of money,"—you ought to tell him: That proves the case. If it costs you a lot of money, it means your conduct has been excessive. And it ought to cost you money.
>
> I am sick and tired of people who get paid for by the taxpayers, running around thinking that they ought to be able to exercise their authority without having to respond to anybody.

*House Subcommittee Hearings on S.265*, *supra*, at 22 (remarks of Sen. Nelson).

Nor does the government's self-serving *a priori* argument from "judicial economy" find any basis in the statute or legislative history. The government asserts that the absence of substantial justification review of fees for fees will encourage excessive litigation by the prevailing party and discourage settlement. *See* Pet. Br. at 30-31. The simple fact is that the statute vests discretion to control the cost of litigation and any abusive behavior by a prevailing party in the court, not the government. The statute already contains explicit provisions for limiting a prevailing party's excesses in litigation by specifically providing for reduction or denial of an award for any portion of the litigation in which the prevailing party unreasonably protracts the litigation. *See* 28 U.S.C. § 2412

(d)(1)(C) and (d)(2)(D). Most tellingly, there is no evidence in the government's brief, or in the literature, to demonstrate that these explicit statutory safeguards are ineffective.[29]

Moreover, there is no evidence in the record of this case that the rule proposed by the government would in any way further the policies the government puts in issue, and certainly none to deal with the concern expressed in this Court's express admonition that a request for attorney's fees should "not result in a second major litigation." *Hensley v. Eckerhart*, *supra* at 437. Rather, the record demonstrates the prescience of this Court's *Hensley* concern and of the Second Circuit's vision of a " 'Kafkaesque judicial nightmare' of an infinite regression of suits to recover fees for fees and an assessment in each of whether the immediately previous government opposition was 'substantially justified.' " *Trichilo*, *supra*, at 708, *citing Cinciarelli v. Reagan*, 729 F.2d 801, 810 (D.C. Cir. 1984). Permitting the government to litigate the substantial justification it may have to each and every fee request, and each element thereof, stage by stage in lieu of use of the statutory tests for reasonableness will serve no purpose but to remove the statute's sole stricture on the government's litigation conduct: liability for the cost of the civil action arising from the unjustified agency action.

29 The government also makes a peculiar distinction between the cost of a fee application, which it concedes is reimbursable as part of litigation on the merits without a separate substantial justification test, and the cost of defending the fee application, which the government asserts is not. *See* Pet. Br. at 10-11 & n.11. The government states no conceptual basis for this distinction, but simply asserts that fees for defending an application are not necessary to the party's case because they will not exist if the government deems the request reasonable. *Id.* Thus, according to the government, a statute which has as its premise that the government will not act reasonably unless it is forced to pay leaves it to the government to determine how much it will pay.



## V. EAJA'S CONDITIONS ON AN AWARD ARE SUFFICIENT AND THE GOVERNMENT'S ALTERNATIVE RULE SHOULD BE REJECTED

Perhaps in recognition of the lack of any reasoned connection between its proposed rule on fees for fees and the language and legislative history of EAJA, the government floats a trial balloon as an alternative by suggesting that this Court adopt the rule stated in *Russell v. Heckler*, *supra*, at 155, which would preclude "substantial justification" review only where the sole claim in the fee litigation is that the government's position on the merits is not substantially justified. *Id.* As the government itself reluctantly admits, "the *Russell* rule is less securely grounded in the language and purpose of EAJA." Pet. Br. at 34. In fact, the *Russell* rule has no foundation whatever.[30]

The *Russell* rule, like the construction urged by petitioners before this Court, simply rewrites the definition of "position of the United States" contained in the statute and defies the plain meaning of the statute and the intent of Congress. "Position of the United States" refers to both the challenged agency action and the government's litigation position. 28 U.S.C. § 2412(d)(2)(D). Congress has expressly stated that a reasonable litigation position will not defeat a fee award if the agency action was not substantially justified. *See* Point II, *supra*. In derogation of this directive, the *Russell* rule would require a court to focus exclusively on the litigation position taken by the government in the fee litigation, thus effectively repealing the 1985 EAJA amendments—a course this Court should decline to follow. It is a well-established principle of this Court that "Congress is the body to amend

30 The *Russell* court undertook no analysis of the language or legislative history of EAJA, preferring to rely on the decision in *Lee v. Johnson*, 799 F.2d 31 (3d Cir. 1986). The *Lee* court similarly conducted no analysis of the statute, simply stating that EAJA "authorizes such recovery [of fees for fees] only in those instances in which the government's opposition to such award is not substantially justified." *Id.* at 39.

[a statute] and not this court." *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 340 (1897); *see also 62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951) ("our problem is to construe what Congress has written. After all, Congress expresses its purposes by words. It is for us to ascertain—neither to add nor to subtract, neither to delete nor distort.").

Furthermore, there is no policy served by this rule that is not more admirably and coherently served by the rule applied by the court of appeals below. As has already been set forth at length, the rule applied below serves the interest of judicial economy; it discourages all unreasonable government challenges to a fee application—not only those based on the government's position on the merits; and it incorporates all of EAJA's existing protections against excessive fee requests and unreasonable litigiousness on the part of an EAJA prevailing party.

## VI. THE GOVERNMENT HAS WAIVED SUBSTANTIAL JUSTIFICATION REVIEW OF RESPONDENTS' FEE APPLICATION

The government is requesting that this Court rule in its favor on an issue which it failed to press either legally or factually in the district court. It is small wonder then that petitioners' arguments are phrased in terms of hypothetical scenarios and imagined horribles.

Thus, although the government predicts dire consequences for the public fisc if the Eleventh Circuit ruling is permitted to stand (a prediction which, as demonstrated, is wholly baseless), it neglects to inform this Court that "[n]one of the fees [for fees], costs or expenses [were] challenged by the government by way of motion, counter-affidavit or request for evidentiary hearing." *Jean VIII*, Pet. App. at 85a. Thus, even if the government were to prevail in this Court, on remand it would be precluded from disputing the *amount* of fees for fees awarded by the district court.



As to entitlement, the government has similarly waived its right to contest the award of fees for fees. The government has the burden of proving its position "had a reasonable basis both in law and fact." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 10, *reprinted in*, 1980 U.S. Code Cong. & Admin. News 4989; S. Rep. No. 253, *supra*, at 6. "Position," of course, refers to both the challenged underlying agency action and the government's litigation position. Here, the government failed to introduce any evidence whatever at the fee hearings, let alone evidence to support either the challenged agency action or the government's litigation posture as "substantially justified." Although the government did argue that fee litigation is subject to separate substantial justification review (*see* Pet. Rep. at 2), it never—despite being given the opportunity to do so—submitted any evidence or presented any arguments below to demonstrate that its position in the fee litigation was justified. Having waived the opportunity below, the government is thus inviting this Court to decide a hypothetical question—an invitation which should be declined. As a result, the issue on which certiorari was granted is not raised by the record, and the writ should therefore be dismissed as improvidently granted.

## CONCLUSION

Although the government strives mightily to recast the plain meaning and legislative intent of EAJA, this Court should be satisfied, as it was when it interpreted another provision of the statute, that "the text of the statute permits, and sound judicial administration counsels" affirmance of the decision below on the question on which certiorari was granted. *Pierce*, *supra* at 2549. Additionally, such a result

would "implement [this Court's] view that a 'request for attorney's fees should not result in a second major litigation.' " *Id.*, *quoting Hensley*, *supra* at 427.

Respectfully submitted,

IRA J. KURZBAN, ESQ.
KURZBAN, KURZBAN & WEINGER, P.A.
Plaza 2559
2650 Southwest 27th Avenue
Miami, Florida 33133
(305) 444-0060

BRUCE J. WINICK, ESQ.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33214
(305) 284-2971

IRWIN P. STOTZKY, ESQ.
University of Miami School of Law
P.O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
One New York Plaza
New York, New York 10004
(212) 820-8000

By: Robert E. Juceam, Esq.
Terrence A. Corrigan, Esq.
Sandra M. Lipsman, Esq.

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No. 89-601

# In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE MCNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

*v.*

MARIE LUCIE JEAN, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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The Equal Access to Justice Act (EAJA) generally requires the government to pay reasonable attorneys' fees to a prevailing party in a civil non-tort action if "the position of the United States" was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Respondents contend that the term "the position of the United States" is limited to the position taken by the government at the merits stage of a lawsuit, and does not include the position taken by the government at the fee stage of that action. That interpretation of the EAJA, respondents argue, is compelled

by the text of Section 2412(d)(1)(A), which refers to "*the* position" of the government, by the absence of any express reference in the Act to successive "stages" or "phases" of the action, and by the fact that the court when resolving a fee request must consider the agency's position upon which the civil action was based.[1]

The text of the EAJA, however, is not as single-mined as respondents claim. Indeed, the definition of "the position of the United States," on which respondents lay such stress, contradicts their basic assumption that the Act contemplates only *one* position. To paraphrase the Court's decision in *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2549 (1988), the text of the Act permits, and sound policy counsels, the conclusion that the term "position of the United States" includes the position taken by the government at the fee stage of an action.

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[1] Respondents also renew their argument, first made in their brief in opposition, that we waived the question presented in the petition. Resp. Br. 48-49. As we explained in our reply brief at the petition stage (at 1-3), that claim is meritless. First, we raised the issue in the district court and preserved it in the court of appeals. See Gov't C.A. Br. 53-54; Gov't C.A. Reply Br. 21-24. The statement of the district court, Pet. App. 85a, on which respondents rely, Resp. Br. 48, read in context means only that we did not challenge the *amount* of fees claimed for the fee stage of the litigation, which is distinct from objecting to any award of fees for fees. (Significantly, elsewhere in their brief respondents agree with our interpretation of the district court's statement, see Resp. Br. 44 & n.28.) Second, contrary to respondents' claim, Resp. Br. 49, it was unnecessary for the government to introduce evidence that its position at the fee stage was reasonable. The relevant issues, for example, whether respondents' counsel were entitled to an enhancement of the fee award for emotional hardship, presented questions of law, rather than fact.



1. To begin with, the Act recognizes that the fees portion of a civil action may be separate from the merits stage. For example, Section 2412(d)(1)(B) provides that a party seeking a fee award must submit an application within 30 days of a final nonappealable judgment (including a settlement), 28 U.S.C. 2412(d)(2)(G). That provision obviously contemplates that a fee request may not be resolved as part of the original proceedings. Other provisions of the Act also contemplate that the court may conduct a hearing over a fee request. Section 2412(d)(1)(B) requires the fee applicant to "itemize[]" his sought-after costs, and Section 2412(d)(2) requires the court to find that attorneys' fees are "reasonable." In sum, the text of the EAJA obviously recognizes that there may be a separate fee stage of the civil action.

At that stage, the court must resolve several issues before awarding a party attorney's fees. Those issues typically involve matters such as whether the fee applicant was a prevailing party, whether the fee application is timely, whether the claimant meets the statutory requirements for a fee award, whether the number of hours spent in the litigation on the merits have been adequately documented and are otherwise reasonable, and whether there are special factors that justify exceeding the $75 hourly fee cap. None of those issues will have been considered in the court's decision on the merits. But even if the only question at the fee stage is whether the government's position on the merits was "substantially justified," that question, too, is not identical to the one resolved at the merits stage, which is whether the government's position was correct. See *Pierce* v. *Underwood*, 108 S. Ct. at 2550.

Moreover, this Court's decisions have also recognized that the fee stage of a case is separate from the merits and "raises legal issues collateral to the main cause of action." *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451 (1982) (holding that a request for attorneys' fees under 42 U.S.C. 1988 need not be filed within the ten-day period set by Fed. R. Civ. P. 59(e)). See also *Buchanan* v. *Stanships, Inc.*, 485 U.S. 265, 267 (1988) (quoting *White* and holding that an award of costs under Fed. R. Civ. P. 54(d) is separate from the merits); *FCC* v. *League of Women Voters*, 468 U.S. 364, 373-374 n.10 (1984) (issue of entitlement to attorney's fees and costs described as "wholly collateral" to judgment on the merits). Compare *Osterneck* v. *Ernst & Whitney*, 109 S. Ct. 987 (1989). As this Court explained in *White* v. *New Hampshire Dep't of Employment Security*, 455 U.S. at 451-452:

> Section 1988 provides for awards of attorney's fees only to a "prevailing party." Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits—an inquiry that cannot even commence until one party has "prevailed." Nor can attorney's fees fairly be characterized as an element of "relief" indistinguishable from the other elements. Unlike other judicial relief, the attorney's fees allowed under § 1988 are not compensable for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.

Two consequences follow. First, when a party seeks attorneys' fees for the fee stage of the case, that stage must be part of "the civil action for which



fees and other expenses are sought," 28 U.S.C. 2412(d)(1)(B), or else that party could not obtain such fees.[2] Second, by expressly requiring the court to resolve such issues before awarding fees, Congress required the government to take a "position" on them at the fee stage of a suit, and that position is also part of "the position taken by the United States in the civil action," 28 U.S.C. 2412(d)(2)(D). The structure of the Act therefore requires that "the position of the United States" includes the position it takes at the fee stage of the litigation. If that is the case, then by the express terms of the Act fees for fees cannot be awarded unless the position of the United States at that stage was not substantially justified.

The careful balance Congress sought to achieve in enacting EAJA, see Pet. Br. 18-21, also suggests that the position of the United States at the fee stage of the litigation may not be deemed irrelevant. Congress could have simply authorized a court to award a reasonable attorney's fee (or a set fee) to any prevailing party. Instead, Congress chose a "middle ground," H.R. Rep. No. 1418, 96th Cong., 2d Sess. 14 (1980), in order to encourage parties to vindicate their legal rights without chilling government officials from vigorously discharging their responsibilities. See H.R. Rep. No. 120, 99th Cong., 1st Sess. 10 (1985); S. Rep. No. 253, 96th Cong., 1st Sess. 6 (1979). Among those responsibilities is "the conduct of litigation in which the United States, an agency, or officer thereof is a party," 28 U.S.C. 516, which is

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[2] Compare *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988). If the term "civil action" includes the fee stage, as we have argued, the term "the position of the United States" should be read to apply to that stage of the action, since the text of the Act links the two terms.

vested in the Department of Justice. Lawyers for the government thus have a fiduciary duty to take reasonable positions on issues that arise in fee litigation in order to avoid needless burdens on the federal treasury. Congress cannot lightly be assumed to have intended to chill the government's ability to fulfill its fiduciary duty to the agency involved and the public. Cf. *Sullivan* v. *Hudson*, 109 S. Ct. 2248, 2256 (1989). In fact, some of those issues (*e.g.*, whether there is present a "special factor, *such as* the limited availability of qualified attorneys for the proceedings involved," 28 U.S.C. 2412(d)(2)(A) (emphasis added)) can only be hammered out in fee litigation, since Congress left them for the courts to decide in each case, or over time. Given this setting, there is no sound reason to deem reasonable positions taken by the government in EAJA fee litigation "second class citizens" undeserving of the same treatment afforded the government's position at the merits stage of a case.

It is no answer to say, as respondents do, Resp. Br. 32-33, that other sections of the EAJA may accomplish the same purpose as the substantial justification provisions. The provisions on which respondents rely authorize a court to reduce a fee award if a prevailing party has "unduly and unreasonably protracted the final resolution of the matter in controversy," 28 U.S.C. 2412(d)(1)(C), or for "any portion of the litigation in which the party has unreasonably protracted the proceedings," 28 U.S.C. 2412(d)(2)(D). Those provisions serve the purpose of allowing a court to sanction *a prevailing party* for obstructive or dilatory tactics, and thereby to deter such actions by others. By contrast, the substantial justification requirement was designed to ensure



that *the government* could take reasonable positions, before and after an action is filed, in order to carry out government policies and protect the public fisc. See Pet. Br. 19 (quoting Senate and House Reports). The provisions of the EAJA cited by respondents do not play the same role in the scheme of the Act as the substantial justification requirement.

2. Respondents and amici rely heavily on the 1985 reenactment and amendment of EAJA, in which Congress provided that the term "the position of the United States" under EAJA "includ[es]" the underlying agency action upon which the litigation was based. Resp. Br. 34-41; National Organization of Social Security Claimants' Representatives (NOSSC) Br. 8-12. As we explained in our opening brief (at 22-25), however, neither the text nor the legislative history of that amendment is inconsistent with our interpretation of the EAJA. Indeed, it undermines respondents underlying view that the government takes only one position in the course of any litigated dispute.

The 1985 amendment resolved a conflict among the circuits on a different issue: namely, whether, in determining a party's entitlement to a fee award in the first instance, which turns on the reasonableness of the government's position *on the merits*, a court was to consider the underlying government action that led to the litigation, or only the government's litigating position. The amendment defined the term "position of the United States" as the agency action leading to the suit "in addition to" the government's position in the lawsuit, 28 U.S.C. 2412(d)(2)(D), in order to ensure that a party could recover fees if the government decided not to defend in court that

agency action.[3] The phrase "in addition to" clearly does not limit the "position of the United States" to only the underlying action taken by the agency. In fact, because the EAJA covers all civil non-tort actions, the Act will apply in cases in which there is no underlying agency action. In such cases, only the government's litigation position can be considered in making the fee determination. The 1985 amendment thus does not require that the court eschew any inquiry into the reasonableness of the government's position at the fee stage just because the "position of the United States" at that stage is limited to its position in court.

Respondents and amici contend that the 1985 amendment shows that there should be an automatic award of fees for fees whenever the government's unjustified position on the merits has caused a fee claimant to litigate: Since the government has unjustifiably caused a claimant to be in court in the

[3] That limited purpose is demonstrated by the legislative history of that amendment, which refers to the circuit split, specifically identifying cases dealing only with entitlement to fees for the merits phase of the case. H.R. Rep. No. 120, 99th Cong., 1st Sess. 11-12 (1985). Only one of the 13 cases to which the Report refers, *Greenberg* v. *United States*, 1 Cl. Ct. 406, 407 (1983), even mentions an application for attorneys' fees for the fee request, and in that case the court refused to make an EAJA award at all, so the fees for fees issue was not addressed.

The limited purpose of the new requirement is also evident from the Act itself, which contains that requirement in Section 2412(d)(1)(B), the provision specifying the requirements for filing a fee application in the first instance. At that point in the proceedings, it would, of course, be impossible to determine whether the government's position in the fee litigation, which is initiated by the filing of the fee application, will be substantially justified.



first place, they argue, the government must pay all the fees resulting from that improper action. But the fee litigation does not stem from unreasonable government litigation in the same way that litigation on the merits stems from the underlying agency action. The litigation results from the claimant's own actions in formulating the fee request. Thus, there is an independent intervening cause of the additional litigation. As long as the government's position in the fee litigation is reasonable (as defined by *Pierce*), there is no reason to require the government to pay the claimant's fees incurred therein.

The fundamental defect in respondents' argument is the assumption, Resp. Br. 29-31, that there is only *one* government "position" in the case, so that once a court has determined that "it" was not substantially justified, there is no need (or warrant) to reconsider that determination, or make another one. In fact, this assumption is refuted by the very statutory definition they rely upon. The statute itself, 28 U.S.C. 2412(d)(2)(D), specifies that the "position" includes at least two positions: the "position taken by the United States in the civil action" *and* the "action or failure to act by the agency upon which the civil action is based." Thus, the statute itself requires that "*the* position" means "positions."

Moreover, if "the position" were read to mean "the *one* position," and if that position cannot be the government's litigating position (as respondents insist), then the only relevant inquiry under EAJA would be whether the underlying agency action was substantially justified. But if that were the rule, it would mean that so long as the underlying agency position was reasonable, the government could never be held liable for EAJA fees, no matter how unreasonable its position in court might be. Clearly, this is

not what respondents want, or what Congress contemplated.

Congress wanted individuals to be able to challenge the government whenever it took a "position" that was not substantially justified. If an agency took an unreasonable position, Congress wanted the individual to be able to overturn that action in court. If the government took an unreasonable position in court, Congress wanted the individual to be able to defeat that position. By the same token, if the government takes an unreasonable position with respect to the relief to be awarded, or on appeal, or in separate litigation over attorneys fees, Congress wanted the individual to be able to resist these distinct "position[s]." But there is no indication that Congress contemplated that once the government had taken an unreasonable position in agency action, a claimant would be entitled to fees for any and all litigation that might be spawned by that action, no matter how many twists and turns it might take and no matter how reasonable the government's position at ensuing stages of the litigation might be.

There is nothing anomalous about reading "the position of the United States" to mean "the position of the United States in the relevant stage of the litigation." Just as the determination that the government was wrong on the merits does not mean that its position was unreasonable, *Pierce* v. *Underwood*, 108 S. Ct. at 2550, so, too, the determination that the government lacked a reasonable basis for believing that its position on the merits was correct does not mean that any opposition to any fee request is also necessarily unreasonable. As we explained in Point II of our opening brief (at 31-34), the government may have a reasonable basis for opposing an applicant's request for a fee in excess of the fee cap (here,



for instance, the government prevailed on three of four such objections) even if the court were to determine that the government's position on the merits was not "substantially justified." The latter conclusion therefore says little about whether the government's position on the discrete issues in the fee stage was substantially justified.[4]

In short, neither the text of that amendment nor its underlying purpose answers the quite different issue posed by this case: whether the government must automatically pay a party's attorneys' fees for the fee stage of a case, even if the government reasonably opposes a fee request, simply because the government must pay such fees for the merits stage of the action. If, as we submit, "the position of the United States" includes the government's position at the fee stage of a case, the government can be required to pay fees for fees only if its position in the fee litigation is not substantially justified.[5]

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[4] Respondents allege that "[t]he principles enunciated in" *Sullivan* v. *Hudson*, *supra*, "compel" the conclusion that the EAJA requires the automatic award of fees for fees whenever the government's position on the merits is not substantially justified. Resp. Br. 43. See also NOSSC Amicus Br. 12 (suggesting that *Hudson* requires that the term "civil action" in EAJA include the entire action). That contention overlooks the Court's analysis in *Hudson*, 109 S. Ct. at 2253-2256, which turned on the particular provision of the Social Security Act, 42 U.S.C. 405(g), governing judicial review of agency benefit determinations, a provision that the Court characterized as "somewhat unusual," 109 S. Ct. at 2254. The narrow focus of *Hudson* on Social Security remand decisions is inconsistent with respondents' attempt to read that decision as mandating a broad interpretation of terms of the EAJA that were not remotely involved in that case.

[5] Relying on the fact that the President vetoed the original version of the 1985 reauthorization of the EAJA, Amici Na-

3. Respondents contend that our interpretation of the Act is inconsistent with its purposes, Resp. Br. 41-43, and rests on a "spurious" understanding of its policies, Resp. Br. 43-46, but they support that claim by oversimplifying those purposes and by overlooking one of its two policies. Respondents claim that the

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tional Immigration Project, et al., contend that the 1985 Act was rewritten to meet the President's concern by limiting a court's inquiry to the agency record. Amici therefore conclude that the requirement that the record upon which the substantial justification determination is based "includ[e] the record with respect to the action or failure to act by the agency upon which the civil action is based," 28 U.S.C. 2412(d)(1)(B), shows that the substantial justification determination is limited to the agency record. Br. 24-25. That argument lacks merit.

The President was concerned with the possibility that an agency official could be required to disclose his mental processes. In his veto message, the President observed that inquiring into the substantial justification of the underlying agency action "could lead to extensive discovery of how the underlying agency position was formulated, and who advocated what position and for what reasons at what time. * * * Such extensive discovery could inhibit free discussion within an agency prior to any final agency policy decision or action for fear that any internal disagreement or reservations would be the subject of discovery and judicial inquiry." Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. of Pres. Doc. 1814, 1815 (Nov. 8, 1984). Cf. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941) ("it [is] not the function of the court to probe the mental processes of the [agency decisionmaker]"). Amici's argument also proves too much. It would be impossible to resolve the questions that arise in the course of the fee litigation solely on the basis of the record in the agency action and the merits stage of the litigation. That record will not even disclose the number of hours expended in the litigation, still less the reasonableness of that expenditure of time, both of which are fundamental elements in any determination of an appropriate fee award.



EAJA's sole concern was to encourage persons aggrieved by government actions to vindicate their rights through litigation. But if that were true, Congress would have enacted an automatic fee-shifting statute. It did not; instead, Congress adopted a more balanced approach, providing for the award of fees only when the government's position is not substantially justified in order to allow the government to take reasonable, even if ultimately unsuccessful, positions, both before and after a lawsuit is filed. The Senate and House Reports, which were quoted in our opening brief (at 18-19), make that point.

Our interpretation of the Act maintains that balance. If the government's position at the merits stage is not "substantially justified," a prevailing party will recover reasonable attorneys' fees for the cost of vindicating his rights at that stage. If the government's position at the fees stage also is not "substantially justified," a party also will recover reasonable attorneys' fees for the cost of litigating the fees issues. In either case, the government will be free to maintain reasonable positions without taxing the public fisc.[6]

4. Finally, our interpretation of the Act will not spawn the ceaseless fee litigation that respondents

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[6] Given some confusion by respondents and amici on the matter, see Resp. Br. 42, it perhaps bears emphasis that we do not argue that if the government is substantially justified in opposing a fee request, the government is thereby absolved from liability for EAJA fees for the litigation on the merits. Our contention is that if the government takes a reasonable position (as defined by *Pierce*) at the fee stage of the case, the government should not be liable for attorneys' fees for the fee litigation itself. For that reason, amicus NOSSC is mistaken in fearing, see NOSSC Br. 19-20, that, under our interpretation of the Act, parties who request only a small amount of attorneys' fees risk losing their entire fee award.

predict and that some lower courts have feared. In many cases the court reviewing a fee request will be able to resolve at one hearing whether the government's position on the merits was "reasonable * * * both in law and fact" under *Pierce*, 108 S. Ct. at 2550; if it was not, whether the fees requested for the merits phase are "reasonable" under *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983); and (whatever answers the court gives to those issues) whether the government's opposition to the fee application also was reasonable under the *Pierce* standard. A reviewing court would then have the benefit of those determinations, and also could resolve all three in one proceeding if it were necessary to do so. Even before *Pierce* held that such determinations are reviewed under the abuse-of-discretion standard, 108 S. Ct. at 2549, 2553, there was no evidence of an "infinite regression" of fee proceedings in those circuits that did not automatically award fees for fees. Accordingly, that prospect should not be dispositive.

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

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IN THE

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COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICES, *et al.*,
*Petitioners,*

v.

MARIE LUCIE JEAN, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, AS AMICUS CURIAE ON BEHALF OF RESPONDENTS

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*Of Counsel:*
KIRK B. ROOSE
NANCY G. SHOR
NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
19 East Central Avenue
Pearl River, New York 10965

JAMES E. COLEMAN, JR.*
JOSEPH E. KILLORY, JR.
EDWARD J. JANGER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
*Counsel for Amicus Curiae*

* Counsel of Record

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-601

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COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICES, *et al.*,
*Petitioners,*

v.

MARIE LUCIE JEAN, *et al.*,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF FOR THE NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES, AS AMICUS CURIAE ON BEHALF OF RESPONDENTS

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### INTEREST OF AMICUS CURIAE

The National Organization of Social Security Claimants' Representatives ("NOSSCR") is a non-profit corporation. Its membership includes attorneys, both in private practice and in programs providing legal services to the poor, who represent individuals seeking disability benefits from the Social Security Administration. In the course of that work, NOSSCR members often file civil actions in the United States district courts on behalf of clients whose disability benefits improperly have been terminated or denied.

The Equal Access to Justice Act, 5 U.S.C. § 504 (1988), 28 U.S.C. § 2412 (1982 & Supp. IV 1986) (the

"EAJA") directly benefits Social Security claimants who win district court reversals of unreasonable agency denials of disability benefits.[1] Fee awards under the EAJA typically reimburse prevailing disability claimants for attorney's fees that otherwise would have to be paid from the claimant's past-due benefits. *See* § 206(b) of the Social Security Act, 42 U.S.C. § 406(b) (1982). NOSSCR's interest in this case is on behalf of its members and their disabled clients who would be denied the benefits of the EAJA if petitioners' construction of that statute were adopted.

## SUMMARY OF ARGUMENT

In enacting the EAJA, Congress sought to "ensure that individuals . . . [would] not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights." H.R. Rep. No. 120, 99th Cong., 1st Sess. 4 (1985) ("1985 House Report"). This Court has recognized that in so doing, Congress did not intend to throw litigants "a lifeline that it knew was a foot short." *Sullivan v. Hudson*, 109 S. Ct. 2248, 2256 (1989).

By its plain language the EAJA effectuates this legislative purpose in a simple and effective manner. The statute provides that when the federal government acts unreasonably it must pay the attorney's fees of the victim of that unreasonable action. An eligible claimant who

[1] District court reversals of agency denials of disability benefits represented between 93 and 95 percent of the successful fee claims under the EAJA in 1988 and 1989. *See* Administrative Office of the United States Courts, Report of the Director on Fees and Expenses Awarded Under the Equal Access to Justice Act (1989) ("1989 Report of the Administrative Office"). Relevant statistical information from this report is contained in Tables 1 and 2 of the Appendix to this Brief. *See also* Administrative Office of the United States Courts, Annual Report of the Director 100-06 (1988) ("1988 Report of the Administrative Office").



"prevails" in a "civil action" or "adversary agency adjudication" against the United States is entitled to attorney's fees if the "position of the United States" either in court or at the administrative level was not "substantially justified."

The EAJA does not contemplate or speak in terms of bifurcated proceedings or separate "actions" for the merits portion of the case and the subsequent determination of the entitlement to and amount of fees. To the contrary, the statute speaks only in terms of a unitary "civil action." This Court recently found that the unitary "civil action" contemplated by Congress was sufficiently broad to encompass administrative proceedings ordered on remand by the district court. *See Sullivan v. Hudson*, 109 S. Ct. at 2257. The only issue in determining whether a claimant is entitled to fees for work done in that "civil action" is whether the claimant has prevailed over an unreasonable government position. The entitlement decision follows naturally from the court's determination of the merits, and is not—as Petitioners repeatedly suggest—the subject of a separate action. The amount of the award is to be "reasonable," as defined in Section 2412 (d)(2)(A) and by this Court's decision in *Hensley* v. *Eckerhart*, 461 U.S. 424, 433-34 (1983),[2] and is subject to reversal or modification only if the court below has abused its discretion. *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988).

In this case, petitioners seek to avoid paying the attorney's fees incurred by the prevailing party in responding to the government's challenge to its request for fees under the EAJA ("fees on fees"). Petitioners concede

[2] Although *Hensley* arose under 42 U.S.C. § 1988, the Court there stated: "The standards set forth in this opinion are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'" 461 U.S. at 433 n.8. Indeed, in *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) this Court apparently ratified that approach in the EAJA context.

that the government acted unreasonably here and that the request for attorney's fees by the victim of that unreasonable action was necessary to obtain the EAJA-mandated fees. Petitioners assert, however, that this final necessary step to secure the fees should be viewed as an independent "civil action" in which the government is given a second opportunity to escape from the consequences of its unreasonable action. Petitioners argue that the government should be allowed to oppose the fee request—and litigate the issue without limitation, so long as its position opposing the fees is not unreasonable—and not be required to compensate the victim for defending against the government's challenge to his fee award. This position is inconsistent with both the language and legislative purpose of the EAJA. Adoption of that position would not merely shorten the EAJA lifeline thrown by Congress, it would tangle that lifeline beyond repair.

Petitioners contend that the substantive finding of unreasonable conduct by the government on the merits should be disregarded, and the government permitted a second opportunity—based on a newfound posture of reasonableness—to deter victims from ever pursuing vindication, by creating the possibility of substantial uncompensable legal costs. This "two bites of the apple" approach, resting upon an artificial bifurcation of the civil action, specifically has been rejected by Congress and is inconsistent with the plain language of the statute.

Congress, in its 1985 amendments to the EAJA, explicitly rejected the kind of bifurcation advocated by petitioners. The 1985 amendments clarify the threshold for entitlement under the EAJA. In those amendments, Congress defined the term "position of the United States" so as to eliminate the possibility that the government could act unreasonably, and then take a reasonable litigating position in order to insulate itself from liability for fees. Petitioners' arbitrary attempt to divide the "civil action" under the EAJA into two unrelated pieces



also is inconsistent with this Court's recent decision in *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), and with this Court's interpretation of similar language in other fee-shifting statutes.

Petitioners' reading of the EAJA directly contradicts Congress' fundamental purpose in enacting that statute. Despite their repeated protests that an "infinite regression" of oppositions to fee petitions is merely a theoretical possibility, Petitioners' core argument is that the court must determine whether the "position of the United States" was reasonable for each identifiable stage in the litigation of a claim. Each such sub-question of substantial justification would be a mixed question of law and fact, requiring legal analysis at the district court level and raising the possibility of appealable issues. Petitioners' theoretical possibility would in fact be the inevitable reality under their view of the EAJA.

In addition to creating the potential for judicial gridlock, Petitioners' gloss on the statute would place successful claimants at the mercy of government attorneys capable of forcing them through an endless series of potentially uncompensated legal arguments and appeals over attorney's fees. This Court repeatedly has stated that disputes about attorney's fees should not become a second major litigation. Adoption of Petitioners' position would do just that. It would create second, third, and fourth rounds of attorney's fee litigation, which ultimately would dwarf the merits litigation in complexity and expense. Moreover, the government would be free to pursue its larger agenda—seeking, as in *Hudson* and in this case, to clarify EAJA issues wholly unrelated to the reasonableness of the claimant's fee request through lengthy and expensive appeals to the Court of Appeals and to this Court—and then force the individual claimant to foot the bill for such "test case" litigation even where the claimant ultimately prevails in that litigation. There can be no doubt that adoption of Petitioners' position would mean that a victim of unreasonable government

action seeking to obtain the assistance of counsel would face the prospect of substantial uncompensated legal work in order to obtain a modest fee award. That is just the type of economic deterrent to vindication of rights that the EAJA was intended to prevent.

Finally, Petitioners' argument rests on a depiction of the EAJA in operation that is flatly wrong. In attempting to create a policy rationale for its reading of the statute, Petitioners paint a picture of the United States government held ransom by a flood of unreasonable fee requests. That picture is wildly inaccurate. Statistical data provided to Congress by the Administrative Office of the United States Courts [3] and the Administrative Conference of the United States [4] demonstrate that (1) the vast majority of fee requests involve very small sums of money, (2) the overall amount of fees awarded by courts is relatively small, and (3) the trial judge, conspicuously ignored by Petitioners, performs a significant mediating role in arriving at an appropriate fee award.

Petitioners' entire analysis ignores the fact that when Congress threw social security claimants and other litigants a "lifeline" it did not do so blindly. By requiring the district court judge to calculate a "reasonable" award, Congress placed the lifeline in capable hands. The available empirical evidence suggests that the presence of judges has had the desired effect of discouraging unreasonable fee requests and that judges have not hesitated promptly to reduce any such requests. Accordingly,

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[3] 1989 Report of the Administrative Office. *See* Appendix Tables 1 and 2.

[4] Administrative Conference of the United States, Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under the Equal Access to Justice Act—October 1, 1987-September 30, 1988 (Feb. 6, 1990) ("1990 Report of the Administrative Conference"). Relevant statistical information from this report is contained in Table 3 of the Appendix to this Brief.



the specter of overstated fee requests and ensuing extensive fee litigation at the expense of taxpayers is simply not borne out by the facts.

## ARGUMENT

### I. PETITIONERS' READING OF THE EAJA IS CONTRARY TO THE LANGUAGE OF THE STATUTE AS INTERPRETED BY THIS COURT

Petitioners characterize "civil actions" under the EAJA as bifurcated proceedings in which purportedly separate "merits" and "fees" litigations are subject to separate and distinct threshold requirements of government unreasonableness. This separate actions/dual thresholds approach is contradicted by the language of the statute, as most recently amended,[5] and the decisions of this Court construing that statutory language. In particular, Petitioners' argument rests on a misguided interpretation of two critical phrases in the statute: (1) "position of the United States," as defined in Section 2412(d)(2)(D), in connection with the threshold requirement of unreasonable government action; and (2) "civil action," as interpreted by this Court, in connection with the scope of the proceeding and the proper amount of the award.

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[5] Section 2412(d)(1)(A) of the EAJA provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a *prevailing party* other than the United States *fees and other expenses*, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any *civil action* (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the *position of the United States* was *substantially justified* or that special circumstances make an award unjust.

(Emphasis added).

### A. The Threshold of Entitlement: Defining the "Position of the United States"

As noted, the legislative purpose in enacting the EAJA was to encourage and assist the victims of unjustified governmental action to vindicate their rights by limiting the financial disincentive associated with the high cost of obtaining legal assistance. The requirement for fee entitlement under the EAJA is "prevailing" in a "civil action" against a governmental action—a "position of the United States"—that was not "substantially justified." Petitioners recognize this statutory test, but posit a separate "position of the United States"—and an accompanying separate "substantial justification" test—in connection with the actual fee request. In arriving at this interpretation, Petitioners misread the statutory definition of the term "position of the United States"; fail to recognize that the substantial justification of the government's litigating positions has no bearing whatsoever on the amount of the award; and seek to relitigate an issue foreclosed by Congress in its 1985 reenactment and amendment of the EAJA.

Prior to the 1985 EAJA Amendments, a split developed among the circuits over the meaning of the term "position of the United States." Some courts held that the "position of the United States" referred only to the government's litigating position.[6] Others took the broader view that the "position of the United States" included the underlying governmental action that led to the litigation in the first place.[7] Congress resolved this

[6] *Spencer v. NLRB*, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); *Ashburn v. United States*, 740 F.2d 843, 849 (11th Cir. 1984); *Boudin v. Thomas*, 732 F.2d 1107, 1115 (2d Cir. 1984); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1487 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984); *Tyler Business Servs., Inc. v. NLRB*, 695 F.2d 73, 75 (4th Cir. 1982).

[7] *National Resources Defense Council, Inc. v. EPA*, 703 F.2d 700, 710 (3d Cir. 1983); *see also Del Mfg. Co. v. United States*, 723 F.2d 980, 986-89 (D.C. Cir. 1983) (Wald, J., dissenting).



split in circuits in 1985 when it added 28 U.S.C. § 2412 (d)(2)(D) to the statute. That section provides that:

> "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings . . .

The legislative history is crystal clear as to Congress' intent in enacting this amendment. Congress wished to focus the attention of courts on the underlying governmental behavior which gave rise to the entitlement to fees. The 1985 House Report states:

> [T]he amendment will make clear that the Congressional intent is to provide attorneys' fees when an unjustifiable agency action forces litigation, and the agency then [tries] to avoid such liability by reasonable behavior during the litigation.

*Id.* at 11.[8]

Congress was emphatic that simply taking a reasonable litigating position would not insulate a party from liability for fees:

> In clarifying the "position" term, the Committee expressly rejects the holding of the District of Columbia Circuit in *Spencer v. N.L.R.B.*, 712 F.2d 539, 557 (D.C. Cir. 1983), cert. denied, 104 S. Ct. 1908 (1984), that the only government "position" to be scrutinized in the context of an EAJA case is that taken in the litigation itself.

[8] The bracketed language reflects corrections made to the original text in H.R. Supp. Rep. No. 120, 99th Cong., 1st Sess., Part II, 4-7 (1985) ("1985 House Supplemental Report"). This statement was made in reference to the portion of the EAJA which was later codified as 5 U.S.C. § 504(a). This reference was made expressly applicable to § 2412(d)(2)(D) by reference at page 17 of the 1985 House Report: "The term 'position of the United States' has been discussed in relation to subsections 1(a)(1) and 1(c)(4)."

This restrictive view, adopted by several other courts of appeal has resulted in the denial of a number of meritorious fee claims, because it fails to focus attention on the unjustified government activity that formed the basis of the litigation.

If the government's litigation position was the sole consideration, the government could insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions; thereby having the effect of substantially justifying their position. *Environmental Defense Fund v. Watt*, 554 F. Supp. 36, 41 (E.D.N.Y. 1982). Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980. *National Resources Defense Council v. EPA*, 703 F.2d 700, 710 (3d Cir. 1983).

> The Committee's clarification of the "position" term is intended to broaden the court's or agency's focus of inquiry for EAJA purposes beyond mere litigation arguments, and to require an assessment of those government actions that formed the basis of the litigation.

*Id.* at 12-13.[9]

Moreover, the legislative history of the EAJA speaks directly to the question of fees on fees. In discussing the question of fees awarded at the agency level, the 1985 House Report states that:

> In addition, the Committee notes that fees incurred by a party when a fee award or denial is appealed are recoverable as part of the final fee award.

1985 House Report at 17.

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[9] Again, this language appears in reference to the portion of the EAJA which was codified at 5 U.S.C. § 504(a)(1). As noted above at footnote 8, this language subsequently was incorporated by reference into the discussion of § 2412(d)(2)(D).



Reaching the conclusion that a reasonable litigating position in the fee portion of the "civil action" does not provide a defense to liability for fees on fees does not, however, require resort to the legislative history. It is compelled by inference from the text of the statute. By including the last clause of § 2412(d)(2)(D) Congress specifically recognized the possibility that, in eliminating the "litigation position" defense to fee liability, it could create automatic liability for all fees. To deal with this possibility, Congress stated that "fees . . . may not be awarded . . . for any portion of the litigation in which the party has unreasonably protracted the proceedings." In carving out this limited exception, Congress made no suggestion that a reasonable government litigating position would constitute a defense to a fee award. Indeed it stated just the opposite in establishing that only where claimant acts unreasonably is there a per se defense to fee liability, and then only for the unreasonable portion of the fee.

The 1985 Amendments and the statute as a whole thus make clear that unjustified agency action triggers EAJA liability for attorney's fees regardless of the reasonableness of the government's subsequent litigating positions. The "litigating position" seized upon by Petitioners here —opposition to the fee request—is indistinguishable from any other of the many litigation positions taken by the government. The 1985 Amendments make clear that the reasonableness of any such losing litigating position is no defense to a claim for fees. Petitioners have shown no reason why such a litigating position should be a defense to a claim for fees incurred in obtaining the fees.[10]

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[10] The Second Circuit in *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702 (2d Cir. 1987), explains the point well:

> Severing separate parts of the litigation for purposes of determining the availability of counsel fees is inappropriate in view of this congressional mandate to look not at the government's litigation position, but rather at the underlying ac-

Petitioners' arguments amount to no more than a vain attempt to end run the 1985 Amendments and resuscitate the "litigation position" as a method for insulating the government from liability for fees. Such a club in the hands of the government would have a chilling effect on the willingness of lawyers to undertake cases in which their compensation depended upon a fee award under the EAJA.

**B. Scope: Legal Services in a Unitary "Civil Action"**

Section 2412(d)(1)(A) states that "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any *civil action*." (Emphasis added). In *Sullivan v. Hudson*, 109 S. Ct. 2248 (1989), this Court examined the meaning of the term "civil action" as used in § 2412. The decision in *Hudson* recognized that "civil action" within the meaning of the EAJA encompasses the entire litigation, defined broadly to include any work that was "necessary" to obtain the results sought. Thus once the threshold to entitlement has been crossed—a claimant prevailing over an unreasonable government action—the civil action for which the government bears fee liability cannot thereafter be subdivided or bifurcated to limit the government's exposure.

In *Hudson*, the issue was whether, in a Social Security disability case, proceedings on remand from the district court were part of the "civil action" defined in § 2412. There this Court looked to cases decided under other fee-shifting statutes and stated that:

> Our past decisions interpreting other fee-shifting provisions make clear that where administrative proceedings are intimately tied to the resolution of

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> tion that spawned the litigation in the first place. . . . [T]here is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

823 F.2d at 708.



> the judicial action and necessary to the attainment of results Congress sought to promote by providing for fees, they should be considered part and parcel of the action for which fees may be awarded.

*Id.* at 2255.

In reaching this conclusion, the Court examined cases decided under similar fee statutes that made fees generally available for all work that was "reasonably necessary" to achieving the goals of the litigation. This Court looked to *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 557-61 (1986), for example, which held that under the Clean Air Act the costs of representation before federal and state administrative agencies in defense of the provisions of a consent decree were compensable under the fee-shifting provision of that statute. The Court also examined *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 60-63 (1980) which held that under the fee-shifting provision of Title VII, a federal court could award attorney's fees for services performed in state administrative and judicial enforcement proceedings. Finally, the Court examined *Webb v. County Board of Education*, 471 U.S. 234, 243 (1985) which held that work performed in administrative proceedings that is "both useful and of a type ordinarily necessary to advance civil rights litigation" may be compensable under 42 U.S.C. § 1988 (1982). After examining these cases, the Court held that their logic leads to the conclusion that remand proceedings before the Social Security Administration could properly be considered part of the "civil action" before the district court for the purposes of making an EAJA award.

This case is easier than *Hudson*. There at least, a question existed as to whether an administrative proceeding on remand came within the four corners of the "civil action." Here there is no such question. The litigation over the amount of a fee is part and parcel of the same "civil action"; indeed, it is the inquiry mandated by the

EAJA itself. The fee request is heard by the same judge, carries the same docket number, and, by definition, was spawned by the same unreasonable governmental action that created the entitlement to the award. Nothing in the language of the statute even remotely suggests that Congress intended that the determination of what fee is reasonable should acquire independent status under the EAJA.

Indeed, even if the fee dispute were not so clearly an integral part of the "civil action," resolution of the dispute is quintessentially "necessary to the attainment of the results Congress sought to promote by providing for fees," *Hudson*, 109 S. Ct. at 2255. Again, as the Second Circuit stated in *Trichilo*:

> To begin with, the very purpose of the EAJA is to ensure that persons aggrieved by unreasonable governmental actions are not prevented from vindicating their claims by the potentially high costs involved in doing so. Since the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees—which would have been unnecessary if not for the governmental action—was the one act for which a claimant could not receive compensation. Since the purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself. The government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already has been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's 'doing business' simply by strenuous resistance to all fee applications as to discourage or



> economically prevent a plaintiff from litigating against the government in the first place.

823 F.2d at 707.

Finally, this interpretation of the term "civil action" is consistent with the 1985 amendment to Section 2412(d)(2)(D), discussed above, that requires courts to view the action as a whole rather than as individual litigating positions.

### C. Government's Liability: Fees and Other Expenses

Petitioners' attempt to create a separate and distinct requirement of independent unreasonable government action with regard to a fee dispute under the EAJA is contradicted by the language of Section 2412(d)(2)(A) which details the method for calculating fees. Nowhere in that section does the term "substantial justification" appear. Section 2412(d)(2)(A) provides for the award of a

> reasonable attorney fee[] . . . based upon prevailing market rates for the kind and quality of services furnished, except . . . not . . . in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved justifies a higher fee. . .

As noted, this Court has spoken at length about what constitutes a 'reasonable fee," and the method for calculating such a fee. The basic method to be used is set forth in *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983):[11]

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by

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[11] In *Hensley* this Court stated that the method set forth therein was of general applicability. 461 U.S. at 433 n.8. This Court ratified this approach in the EAJA context in *Pierce v. Underwood*, 108 S.Ct. 2541, 2553 (1988). *See* note 2, *supra*.

> a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where documentation of hours is inadequate, the district court may reduce the award accordingly.

*Id.* at 433-34.

Multiplying the number of hours worked by the hourly rate does not end the inquiry. The Court also defined the proper approach in cases involving partial success on multiple claims.

> There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?

*Id.* at 434.

The *Hensley* Court also made clear that this was not to be an overly mechanical inquiry, and that the determination of the amount of an award was committed to the discretion of the judge, saying:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion,



> however, must be exercised in light of the considerations we have identified.

*Id.* at 436-37.[12]

The teachings of *Hensley* on this issue are more than adequate in guiding district courts in the awarding of fees under the EAJA, and provide sufficient protection against unreasonable fee requests. Nothing in the statutory language of the EAJA suggests that Congress intended that the approach followed in these cases should be overridden—and the discretion of the district judge usurped—by the application of a multi-tiered and recurring threshold test of substantial justification.

Thus, under the EAJA, the inquiry into entitlement requires a court to engage in a two step inquiry. First, the court determines whether an eligible claimant has "prevailed" in a "civil action" against the United States. Second, the court determines whether the "position of the United States" as defined in Section 2412(d)(2)(D) was "substantially justified." If these criteria for entitlement are met, the court then calculates the amount of a "reasonable" fee. To do so, the court applies the principles set forth in Section 2412(d)(2)(A) and this Court's decision in *Hensley*. On appeal, that amount is subject to reversal or modification only if the district court abuses its discretion. *Pierce v. Underwood*, 108 S. Ct. at 2553.

## II. SEVERING THE FEE DISPUTE FROM THE LITIGATION ON THE MERITS WOULD BE INCONSISTENT WITH THE ESSENTIAL LEGISLATIVE PURPOSE OF THE EQUAL ACCESS TO JUSTICE ACT

Petitioners concede that "Fee litigation is . . . part of the 'civil action.'" Petitioner's Brief at 17. This

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[12] This Court recently reaffirmed the principles set forth in *Hensley* in *Texas State Teachers Association v. Garland Independent School District*, 109 S. Ct. 1486, 1491-92 (1989).

should end the inquiry. Petitioners nevertheless repeatedly strain to assert that fee litigation is separate and distinct from the litigation on the merits. Petitioners' basic premise is that it would be logically inconsistent to "impose a standard of liability for the fee litigation phase of the action that is different from . . . the standard set forth in the Act." *Id.* The short answer is that both phases are part of the *same* action and therefore share the very same threshold standard of liability: government action that is not substantially justified. Once that standard is met for the "merits phase," it is satisfied for the "fees phase."

### A. Petitioners' Argument Is Logically Flawed

Petitioners make three policy arguments in favor of their interpretation of the statute:

(1) the Eleventh Circuit's position would chill legitimate enforcement efforts;

(2) the Eleventh Circuit's position would require the government to pay fees even when it makes arguments which ultimately succeed; and

(3) Petitioners' interpretation would deter unreasonable fee requests.

The first two arguments rest on Petitioners' failure to distinguish the inquiry into entitlement from the resolution of disputes about amount. The third ignores the full effect of the government's argument: not only would Petitioners' position deter unreasonable fee requests, it also would deter reasonable fee requests by placing all prevailing parties at the mercy of the government's whim.

First, Petitioners are correct that by enacting the EAJA Congress did not wish to chill legitimate enforcement efforts. It did, however, wish to encourage challenges to unreasonable governmental behavior. It struck a balance between those seemingly conflicting goals by distinguishing the threshold for entitlement from the inquiry into the amount of the award. To protect enforcement, Congress established a threshold for entitlement that goes beyond merely prevailing and requires unreasonable governmental action to form the basis for the claim. Once the entitlement to fees is established, however, Congress left the determination of amount to the discretion of the judge guided by the considerations set forth in Section 2412(d)(2)(A) and *Hensley*. *See Pierce v. Underwood*, 108 S. Ct. at 2553.



Second, Petitioners' argument that the Eleventh Circuit's reading of the EAJA would force the government to compensate claimants even for arguments as to which the government prevails is simply wrong. Under the framework set forth in *Hensley*, nothing prohibits the court when awarding fees on fees from taking into consideration the reasonableness of the prevailing party's effort to establish the amount of fees. Indeed, that is the mandate of the Eleventh Circuit's position in this case.

Finally, Petitioners argue that reopening the question of substantial justification will deter unreasonable requests. To the contrary, its sole effect would be to impair the functioning of the statute by placing litigants at the mercy of governmental whim. Government lawyers faced with fee petitions would have nothing to lose and everything to gain by strongly opposing every fee request so long as some plausible grounds could be found to place the issue in dispute. Fee awards are small, and appeals are expensive. It is not difficult to imagine that the cost of litigating over fees in three courts, as in this case, could dwarf the amount of fees actually in dispute. As discussed at pages 24-25 *infra*, and demonstrated by the data contained in Tables 1 and 2 of the Appendix, the average EAJA award by a court is $4,482. The amount of fees on fees is only a small portion of that. The cost of an appeal could easily exceed the amount of fees at issue. From the government's perspective the effort may be justified for policy considera-

tions beyond the particular case. For the prevailing party, however, the only issue is whether his fees are paid. Few lawyers would be willing to bear the cost of litigating the policy issue just to recover the small amounts of fees at issue.

Indeed, Petitioners concede that:

> [I]t is . . . true, at least as a theoretical matter, that inquiring into whether the government was substantially justified in arguing in fee litigation that its position on the merits was substantially justified could lead to an "infinite regression," with the government asserting in response to each succeeding fee application that its defense to the preceding application was substantially justified.

Brief of Petitioners at 29. Petitioners' dismissal of the infinite regression possibility is based on the assertion that it has not occurred in the circuits that have adopted its position. This explanation is insufficient. Indeed *Pierce*, *Hudson*, and this case provide evidence of the government's willingness to litigate aggressively over attorney's fees questions. Moreover, rather than inspiring voluntary restraint by the government, it is far more likely that the effect of the rule has been to cause claimants simply to give up on their fees rather than undertake a potentially costly battle against the government.

Finally, Congress was cognizant of the possibility of unreasonable behavior by fee claimants, and the EAJA provided a mechanism for dealing with it. In § 2412(d)(2)(D), the statute provides that a fee award shall be reduced if the plaintiff unreasonably prolongs the litigation. That determination is made as part of the inquiry into whether the fee requested is reasonable. Petitioners instead seek to establish an entirely different and more burdensome mechanism for making the same determination: a mechanism that would swallow the required statutory inquiry, and lead to consequences inconsistent with the essential purposes of the EAJA.



## III. PETITIONERS' ARGUMENTS REST ON AN INACCURATE EMPIRICAL PICTURE OF THE EAJA IN ACTION

Petitioners' argument rests on a picture of the EAJA in operation that is simply wrong as an empirical matter. In support of its position, Petitioners paint a picture of the United States government held ransom by a flood of unreasonable fee requests. However, statistical data provided by the Administrative Office of the United States Courts [13] and the Administrative Conference of the United States [14] belie Petitioner's parade of horrors. These statistics demonstrate that: (1) the present case is not the typical EAJA case; (2) the total amount awarded under the EAJA by courts and agencies is relatively small and indeed is less than Congress expected when it reenacted the statute in 1985; and (3) judges faced with an unreasonable fee request have the ability, and indeed do not hesitate, to reject an amount that is unreasonable. The third point is perhaps the most important, in that it strongly suggests that the active presence of the judge, as called for in the plain language of the statute, imposes any necessary discipline on the amount of fee requests.

### A. This Is Not a Typical EAJA Case

The fee awarded by the district court in this case reflects the unusual nature of the case, its size, length and complexity. A cursory review of the statistics contained in Tables 1 and 2 of the Appendix to this Brief demonstrates how the typical EAJA claim differs from the claim at issue here.

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[13] *See* 1989 Report of the Administrative Office. Relevant statistical data from this report are contained in Tables 1 and 2 in the Appendix to this Brief. *See also* 1988 Report of the Administrative Office.

[14] 1990 Report of the Administrative Conference. Relevant statistical information from this report is contained in Table 3 of the Appendix to this Brief.

The typical EAJA fee awarded by a court is generally quite small. Social Security claimants who have won relief in court are the principal beneficiaries of EAJA awards. In 1988 and 1989, Social Security claimants who won reversals of the agency's disability determination in district court represented between 93 and 95 percent of the successful fee claimants under EAJA. Sixty-one percent of the total dollars awarded under EAJA in statistical year 1989 were in these disability cases.[15] In statistical year 1989, district courts and courts of appeals granted EAJA fees and expenses in 383 cases against HHS, and awarded a total of $1,133,-938 to Social Security claimants. Hence, the average award in the most common type of EAJA case was $2,961. This is well in proportion to the amount of benefits at stake in disability cases. Indeed, the average EAJA award for all types of cases in 1989 was $4,482, far below the amount of fees at stake in the present case.

EAJA also applies at the agency level. Under 5 U.S.C. § 504 (1988), agencies are also required to award fees when the United States takes an unreasonable position in an "adversary" agency adjudication. *See Sullivan v. Hudson*, 109 S. Ct. at 2255. Awards at the agency level are no different than those awarded by courts. The amount is typically quite small. As Table 3 demonstrates, the average award made by agencies in fiscal years 1982-1988 was $3,278.[16]

### B. The EAJA Has Not Led to Burdensome Governmental Liability

Notwithstanding the importance of EAJA fees to Social Security claimants, it is important to note that,

[15] In statistical year 1988, 47 percent of the dollars awarded under EAJA were awarded in cases against HHS. This low percentage is primarily because of two large awards made that year. *See* 1988 Report of the Administrative Office at 103-04.

[16] 1990 Report of the Administrative Conference.



after six years in effect, the EAJA has not proven to be burdensome to the public fisc. Congress noted when it reenacted the EAJA in 1985 that it had not proven to be nearly as expensive as originally predicted. Since reenactment, the total amount awarded under the statute has even been less than the amount predicted in the revised 1985 cost estimate.

The House Report, relying on information gathered by the Administrative Office of the United States Courts and the Administrative Conference of the United States stated that:

> Between October 1, 1981 (the effective date of the Act) and October 1, 1984, approximately $3.9 million have been awarded under the Act. . . . These awards are dramatically less than the $100 million annual cost estimated by the Congressional [Budget] Office (CBO) in 1981 and higher amounts predicted by the Justice Department.

1985 House Report at 8-9. Indeed, when Congress reenacted the EAJA it expressed some dissatisfaction with the low amount of fees awarded under the statute, noting that "part of the problem in implementing the Act has been that agencies and courts are misconstruing the Act." *Id.* at 9. The response to this dissatisfaction was the enactment of § 2412(d)(2)(D) which defined "the term "position of the United States."

In 1985, the Congressional Budget Office again projected the future cost of the amended EAJA, making the following assumptions:

> The number of parties recovering fees has grown from 20 in fiscal year 1982 to 64 in 1983 to 198 in 1984. If that number continues to increase by about 130 each year, it would reach 1,000 in 1990. We estimate an average award of $6,000 and assume that it will remain roughly constant. (The average award was $5,600 in[] 1984). We also expect that a few unusually large awards will be made, aver-

> aging approximately $500,000 apiece. We assume that one of these large awards will be made in both 1986 and 1987, and two in each subsequent year through 1990. On this basis, we project costs reaching about $7 million [in] 1990.

1985 House Supplemental Report at 3. The extent to which even these projections have turned out to be inflated is demonstrated by the data contained in Tables 1 and 3 of the Appendix.

In the courts, the total amount awarded under EAJA has not exceeded $4,000,000 in any single year, and over the last two years has hovered at approximately $2,000,000. The number of applications has remained relatively constant over the last three years at approximately 500, and has never exceeded 700. The number of fee applications granted has been stable over the last three years at approximately 400. And, as noted, the average award by a court in fiscal 1989 was $4,482, well below the $6,000 predicted. 1989 Report of the Administrative Office at 69.

As the data in Table 3 indicate, the picture is the same in the administrative agencies. The total amount awarded has been exceedingly small. Between 1982 and 1988, a total amount of $1,193,231 was awarded, or an average of $170,462 each year.[17] The number of applications filed has never exceeded 300, and in fiscal 1988 the number actually declined to 210 from 267 the year before. Finally, in fiscal years 1982-1988, the average award by an administrative agency was $3,278, far below

[17] In 1988, the total amount awarded reached an all time high of $513,795.65. This was due primarily to the settlement by HHS of *Underdue v. Bowen*, No. K-83-3885 (D. Md. 1987), which enabled certain fee applicants to file with HHS after the statutory filing deadline had passed. *See* 1990 Report of the Administrative Conference at App. V. This far exceeds the previous high and is probably a statistical aberration.



the $6,000 predicted by the CBO. Indeed, in fiscal 1988 the average successful fee applicant received only $1,828.

Thus in most cases the fee award is relatively small. Fees on fees represent only a tiny portion of that award. Simply by forcing a claimant to defend a fee award on appeal, the government may double the amount of time a lawyer must spend on his or her case. If fees on fees are not allowed, the expense to the claimant may not be worth the effort, and the claimant may give up on fees to which he or she is legally entitled. That would defeat the very purpose of the EAJA.

### C. Petitioners Have Ignored the Role of the Judge in Calculating a Reasonable Award

Perhaps most importantly, these statistics, and the discussion above, demonstrate that Petitioners have completely ignored the mediating role of the trial judge in determining the appropriate amount of a fee award. Petitioners' brief seems to assume that the only thing standing between the EAJA claimant and the public fisc is the government lawyer. Last year courts denied 20% of all fee applications outright, and Table 2 demonstrates that courts have not hesitated, when presented with an unreasonable fee request, to reduce the award to an appropriate level, sometimes by as much as 80%. Thus, as noted above, it is important to remember that the lifeline thrown by Congress was placed in the hand of the district court judge. Adoption of Petitioners' argument would create a tremendous incentive for government attorneys simply to stand in the way of the toss.[18]

[18] Petitioners argue as a fallback position that if their reading of the statute is rejected, this Court should at least adopt the "technical defense" exception to fees on fees. The question of a technical defense is not presented by this case. Moreover, the arguments stated above apply with equal force to that interpretation. Indeed, Petitioners concede that such a reading is inconsistent with the statutory language.

## CONCLUSION

This analysis and these statistics demonstrate that the position advocated by petitioners, far from remedying a problem, would place successful litigants at the mercy of government attorneys who would have the ability to force prevailing parties through an endless regression of legal argument and attorney's fees appeals in the pursuit of fees to which the government concedes they are statutorily entitled. This Court has stated repeatedly that litigation over fee disputes should not become a second major litigation. Adoption of Petitioners' interpretation would do just that; create second, third and fourth rounds of attorney's fee litigation, the sum of which would dwarf the merits litigation in complexity. Such a result is antithetical to the purpose of the EAJA. Accordingly, the opinion of the Eleventh Circuit should be affirmed.

Respectfully submitted,

*Of Counsel:*
KIRK B. ROOSE
NANCY G. SHOR
NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
19 East Central Avenue
Pearl River, New York 10965

JAMES E. COLEMAN, JR.*
JOSEPH E. KILLORY, JR.
EDWARD J. JANGER
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
*Counsel for Amicus Curiae*

* Counsel of Record

April 9, 1990

# APPENDIX

## APPENDIX

### Table 1

Decisions on Equal Access to Justice Act Applications
1984 Through 1989

| Year | Total Applications | Applications Denied | Applications Granted | Total Awarded |
|---|---|---|---|---|
| 1984 | 296 | 130 | 166 | $1,417,211 |
| 1985 | 577 | 157 | 420 | $1,912,768 |
| 1986 | 672 | 108 | 564 | $2,567,910 |
| 1987 | 496 | 95 | 401 | $3,878,033 |
| 1988 | 521 | 105 | 416 | $2,027,997 |
| 1989 | 503 | 90 | 413 | $1,850,906 |
| Percent Change 1989 over 1988 | −3.5 | −14.3 | −0.7 | −8.7 |

Source: Administrative Office of the United States Courts, 1989 Annual Report of the Director

## Table 2

### Decisions on Applications for Equal Access to Justice Act Awards By Type of Court and Agency 1989

| Court/Agency | Applications | Applications Denied: Number | Applications Denied: Total Fees and Expenses Claimed | Applications Granted: Number | Applications Granted: Total Fees and Expenses Claimed | Applications Granted: Total Amount Awarded | Nature and Amount of Awards *: A | B | C | D |
|---|---|---|---|---|---|---|---|---|---|---|
| Total | 503 | 90 | $1,561,263 | 413 | $2,419,123 | $1,850,906 | $1,804,162 | — | $13,372 | $33,372 |
| U.S. Courts of Appeals | | | | | | | | | | |
| Commodities Futures Trading Commission | 1 | 1 | 566,000 | — | — | — | — | — | — | — |
| Dept. of Agriculture | 2 | 1 | 8,750 | 1 | 14,127 | 14,127 | 14,127 | — | — | — |
| Dept. of the Air Force | 1 | 1 | 37,791 | — | — | — | — | — | — | — |
| Dept. of the Army | 5 | 4 | 55,600 | 1 | 15,750 | 15,750 | 15,750 | — | — | — |
| Dept. of Commerce | 2 | 2 | 14,925 | — | — | — | — | — | — | — |
| Dept. of Health and Human Services | 30 | 16 | 59,318 | 14 | 47,096 | 42,001 | 41,770 | — | — | 231 |
| Dept. of Labor | 2 | 2 | 11,300 | — | — | — | — | — | — | — |
| Dept. of the Treasury | 1 | 1 | 25,000 | — | — | — | — | — | — | — |
| Equal Employment Opportunity Commission | 1 | 1 | 73,494 | — | — | — | — | — | — | — |
| Federal Energy Regulatory Commission | 1 | — | — | 1 | 19,281 | 12,500 | 12,500 | — | — | — |
| Immigration and Naturalization Service | 4 | 2 | 13,100 | 2 | 3,384 | 3,384 | 3,384 | — | — | — |
| National Labor Relations Board | 2 | 1 | 15,000 | 1 | 17,394 | 8,697 | 8,697 | — | — | — |
| Office of Personnel Management | 1 | 1 | 19,000 | — | — | — | — | — | — | — |
| Securities and Exchange Commission | 1 | 1 | 44,000 | — | — | — | — | — | — | — |
| U.S. Court of International Trade | | | | | | | | | | |
| Dept. of the Treasury | 2 | 2 | 50,181 | — | — | — | — | — | — | — |
| U.S. Claims Court | | | | | | | | | | |
| Dept. of the Air Force | 1 | — | — | 1 | 156,790 | 37,990 | 24,618 | — | 13,372 | — |
| Dept. of the Army | 3 | 2 | 119,156 | 1 | 31,841 | 10,750 | 10,750 | — | — | — |
| Dept. of Defense | 5 | 1 | 13,339 | 4 | 155,052 | 77,416 | 76,450 | — | — | 966 |
| Dept. of Housing and Urban Development | 1 | 1 | 36,987 | — | — | — | — | — | — | — |
| Dept. of the Interior | 1 | — | — | 1 | 32,751 | 32,751 | 30,384 | — | — | 2,367 |
| Dept. of Justice | 1 | — | — | 1 | 93,844 | 23,079 | 21,137 | — | — | 942 |
| General Services Administration | 1 | — | — | 1 | 61,584 | 11,102 | 8,403 | — | — | 2,699 |
| Internal Revenue Service | 2 | 2 | 133,938 | — | — | — | — | — | — | — |
| U.S. District Courts | | | | | | | | | | |
| Dept. of Agriculture | 3 | — | — | 3 | 48,120 | 18,602 | 18,058 | — | — | 544 |
| Dept. of the Air Force | 1 | 1 | 4,500 | — | — | — | — | — | — | — |
| Dept. of the Army | 1 | 1 | ** | — | — | — | — | — | — | — |
| Dept. of Energy | 1 | — | — | 1 | 84,500 | 50,832 | 48,475 | — | — | 2,357 |
| Dept. of Health and Human Services | 411 | 42 | 119,594 | 369 | 1,201,074 | 1,091,937 | 1,080,913 | — | — | 11,024 |
| Dept. of the Interior | 2 | — | — | 2 | 44,956 | 43,955 | 43,675 | — | — | 280 |

Table 2—Continued

| Court/Agency | Applications Denied: Applications | Applications Denied: Number | Applications Denied: Total Fees and Expenses Claimed | Applications Granted: Number | Applications Granted: Total Fees and Expenses Claimed | Applications Granted: Total Amount Awarded | Nature and Amount of Awards *: A | B | C | D |
|---|---|---|---|---|---|---|---|---|---|---|
| Dept. of State | 1 | — | — | 1 | 150,000 | 146,318 | 146,318 | — | — | — |
| Environmental Protection Agency | 1 | — | — | 1 | 88,051 | 88,051 | 78,696 | — | — | 9,355 |
| Federal Trade Commission | 1 | 1 | 27,500 | — | — | — | — | — | — | — |
| Food and Drug Administration | 1 | — | — | 1 | 37,058 | 37,058 | 37,058 | — | — | — |
| General Services Administration | 1 | — | — | 1 | 50,000 | 22,184 | 20,577 | — | — | 1,607 |
| Immigration and Naturalization Service | 4 | 1 | 6,390 | 3 | 29,525 | 25,955 | 25,955 | — | — | — |
| Securities and Exchange Commission | 1 | — | — | 1 | 30,000 | 30,000 | 30,000 | — | — | — |
| Veterans Administration | 3 | 2 | 104,400 | 1 | 6,945 | 6,467 | 6,467 | — | — | — |

** Petitioner did not specify an amount in the request for attorney fees.

SOURCE: Administrative Office of the United States Courts, 1989 Annual Report of the Director

A = Attorney Fees

B = Study, Analysis, Engineering Report, Test, or Project

C = Expert Witness Fees

D = Other, including photocopying costs, telephone expenses, and transportation costs.





Table 3

Disposition of Applications for Awards of Fees and Expenses under the Equal Access To Justice Act in Administrative Proceedings

FY 1982-1988

| Fiscal Year | Applications Filed | Applications Denied | Applications Granted | Amount Awarded |
|---|---|---|---|---|
| 1982 | 103 | 31 | 0 | $0.00 |
| 1983 | 88 | 53 | 8 | $35,933.89 |
| 1984 | 146 | 76 | 13 | $121,943.79 |
| 1985 | 56 | 63 | 11 | $200,095.66 [1] |
| 1986 | 128 | 54 | 21 | $107,141.29 [1] |
| 1987 | 267 | 60 | 30 | $214,320.74 [1] |
| 1988 | 210 [2] | 94 [3] | 281 [4] | $513,795.65 [1] |
| All Years | 998 | 431 | 364 | $1,193,231.00 [1] |

[1] Does not include unknown amounts in settlement.

[2] The department of Health and Human Services reports 134 of the 210 cases filed in FY88 under the Act.

[3] The department of Health and Human Services reports 72 of the 94 cases filed in FY88 in which applications were denied .

[4] The department of Health and Human Services reports 240 of the 281 cases filed in FY88 in which application for fees was granted.

Source: Report of the Chairman of the Administrative Conference of the United States on Agency Activities Under The Equal Access to Justice Act, February 6, 1990

Supreme Court, U.S.
FILED
APR 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-601

IN THE

# Supreme Court of the United States

October Term 1989

GENE McNARY, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, et al.,

*Petitioners,*

vs.

MARIE LUCIE JEAN, et al.,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## BRIEF OF THE NATIONAL IMMIGRATION PROJECT, THE NATIONAL LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE ASIAN LAW CAUCUS, AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

**ROBERT L. KING**
*Counsel of Record*
TIMOTHY J. TOOHEY
DEBEVOISE & PLIMPTON
333 South Grand Avenue
Suite 5150
Los Angeles, California 90071
(213) 680-8000

NIELS W. FRENZEN
Public Counsel
*Counsel for Amici Curiae*

BEST AVAILABLE COPY

BEST AVAILABLE COPY

Lorraine Mitchell - Legal Briefs
732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021
TELEPHONE (213) 747-5631

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No. 89-601

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term 1989

Gene McNary, Commissioner of the Immigration and Naturalization Service, et al.,

Petitioners,

vs.

Marie Lucie Jean, et al.,

Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

# Brief of The National Immigration Project, The National Lawyers Committee For Civil Rights Under Law, The Mexican American Legal Defense and Educational Fund, The Asian American Legal Defense and Educational Fund, The Asian Law Caucus, and The American Civil Liberties Union As Amici Curiae Supporting Respondents

## INTEREST OF AMICI

Amici curiae, the National Immigration Project, the National Lawyers Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, the Asian American Legal Defense and Educational Fund, the Asian Law Caucus, and the American Civil Liberties Union, submit the following brief in support of respondent. Amici have obtained the consents of both parties to this action and those consents have been filed with the Clerk of this Court.

Amici are national organizations working in the area of public interest and immigration law. All amici enlist the services of volunteer lawyers to represent parties in order to seek review of or defend against challenged governmental action. Amici, with the assistance of volunteer lawyers, regularly represent both individuals and classes on a pro bono publico basis, not only to redress individual acts of injustice, but also to promote important public policy concerns, including the fairness and even-handedness of government conduct and the rule of law.



In this connection, amici regularly make applications for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d) (1982 & Supp. V 1987). The availability of fees under EAJA and other fee-shifting statutes allows amici to continue their work. Recovery of attorney fees under EAJA and other fee-shifting statutes constitutes a significant portion of the annual budgets of

amici. Although amici are able to obtain lawyers who volunteer to represent many clients on a pro bono basis, the availability of attorney fees under EAJA is an important factor in the decision to undertake such representation. Many individual practitioners and law firms would be unwilling to shoulder the burdens of public interest litigation for amici at the trial and appellate levels if there were no possibility of securing attorney fees.

Amici curiae believe that EAJA's purposes are best fulfilled by allowing successful fee applicants to obtain fees for fee litigation without requiring a court to make a separate inquiry into whether the government's opposition in the fee litigation was substantially



justified. Resolution of this has a significant effect on many organizations and individuals, like amici, who litigate to redress injustice and promote the broader aims of EAJA.

## SUMMARY OF ARGUMENT

EAJA's purposes -- to facilitate challenges to arbitrary governmental action and to promote governmental accountability -- are best fulfilled by allowing prevailing parties to recover fees for fee litigation without a separate tangential inquiry into whether the government's position in the fee litigation was substantially justified. The policies embodied by EAJA are best served by a rule which would give fee applicants fees for fee litigation when it is determined that the government's position in

the main litigation was without substantial justification.

The language and legislative history of EAJA so dictate. Congress specifically rejected an approach that would focus on the justification of the government's opposition to fees because it would penalize those who successfully challenge unreasonable government conduct by making successful recovery of fees contingent upon a demonstration that the government was unreasonable in opposing fees.

A 1985 amendment to EAJA makes clear that courts are not to analyze whether the government's position in separate phases of the litigation was substantially justified in making fee determinations. Under EAJA the government is



liable for fees for the fee litigation if it is found that the underlying acts giving rise to the litigation were without substantial justification.

The rule urged by petitioners, which would require the court to analyze whether the government's position in the fee litigation was substantially justified, would run counter to the provisions and purposes of EAJA by necessitating a separate evidentiary determination related only to the fees litigation. EAJA rejects this approach and requires courts instead to examine only the record developed in the underlying proceedings.

The rule adopted by the courts below best satisfies the important policy concerns embodied in EAJA. Having al-

ready successfully challenged unreasonable government conduct, EAJA fee applicants should not be made to shoulder the additional burden of another round of litigation on the justification for the government's position regarding an award of fees. This Court should affirm the ruling of the trial court which avoids the nightmarish prospect of an indefinite round of litigation on fee matters by awarding fees for fee litigation without a separate inquiry into whether the government's position in the fee litigation was without substantial justification.



## ARGUMENT

### I.

### AWARDING FEES FOR AN EAJA FEE LITIGATION DOES NOT REQUIRE A COURT TO DECIDE WHETHER THE GOVERNMENT'S POSITION IN THE FEE LITIGATION WAS SUBSTANTIALLY JUSTIFIED.

EAJA was passed in order to reduce the "disparity between the resources and expertise" of individuals or small business challenging government action and the government "by entitling certain prevailing parties to recover an award of attorney fees, expert witness fees and other expenses against the United States, unless the Government action was substantially justified." H.R. Rep. No. 96-1418, 96th Cong., 2nd Sess. 5, reprinted in 1980 U.S. Code Cong. & Admin. News 4984.

EAJA and other fee-shifting statutes represent a departure from the "American Rule" on attorney fees under which each party bears his own attorney fees. EAJA's allowance of fee-shifting is founded "on the premise that a party who chooses to litigate an issue against the Government is not only representing his or her own vested interest but is also refining and formulating public policy." Id. at 4988.

To that end, EAJA states that

> a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.



28 U.S.C. §2412(d)(1)(A).

As is the case with other fee-shifting statutes, such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, courts regularly award reasonable fees to prevailing parties under EAJA for litigating attorney fee claims. See, e.g., Cinciarelli v. Reagan, 729 F.2d 801, 809 (D.C. Cir. 1984). Courts have consistently held that the award of fees for fee litigation is consonant with the fundamental purpose of EAJA: "ensur[ing] that persons aggrieved by unreasonable governmental actions are not prevented from vindicating their claims by the potentially high costs involved in doing so."

Trichilo v. Secretary of Health and Human Services, 823 F.2d 702, 707 (2nd Cir. 1987) ("Trichilo I").

In order to recover fees under EAJA, the government's position in the underlying action must be determined to be without substantial justification. It follows from this standard, which focusses on the unreasonable activity of the government giving rise to the litigation, that the fee award results because the litigation proceeds directly from the government's conduct. An EAJA fee applicant who confronts litigation over recovery of fees has been brought to that pass only because the government, by acts found to be without substantial justification, has forced him to litigate. As the Second Circuit noted in



Trichilo I, "[s]ince the statute primarily assures prevailing plaintiffs their reasonable attorney's fees, it would be ironic if claiming those very fees -- which would have been unnecessary if not for the governmental action -- was the one act for which a claimant could not receive compensation." 823 F.2d at 707.

The majority of the courts of appeal which have considered the question have held that fees should be awarded if the court finds that the government's "position" in the underlying agency action or litigation arising from that action was not "substantially justified".[1]

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1. Five circuits have adopted this approach: see Trichilo I, 823 F.2d (continued...)

Under the approach taken by the courts below, a separate inquiry into the justification of the government's position in the fee litigation is unnecessary. If the government's conduct leading to the underlying litigation was not substantially justified, a successful fee applicant should not be forced into

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1.(...continued)
702 (2nd Cir. 1987); Cinciarelli, 729 F.2d 801 (D.C. Cir. 1984); Jean v. Nelson, 863 F.2d 759 (11th Cir. 1988); Powell v. Commissioner, 891 F.2d 1167 (5th Cir. 1990); and McDonald v. Secretary of Health and Human Services, 884 F.2d 1468 (1st Cir. 1989). Four circuits have, to some extent, adopted the rule espoused by petitioners. See Cornella v. Schweiker, 741 F.2d 170 (8th Cir. 1984); Continental Web Press, Inc. v. N.L.R.B., 767 F.2d 321, 324 (7th Cir. 1985); Russell v. Heckler, 814 F.2d 148, 155 (3rd Cir. 1987), vacated on other grounds, 108 S. Ct. 2891 (1988); National Wildlife Federation v. Federal Energy Regulatory Comm'n, 870 F.2d 542 (9th Cir. 1989).



another round of litigation on the further question of whether the government's fee opposition was substantially justified. This rule avoids the "Kafkaesque judicial nightmare" that would result from the "distinct possibility of an infinite regression of EAJA litigation", Cinciarelli, 729 F.2d at 810.

In contrast, under the rule suggested by petitioners, the government would be allowed to proliferate litigation over fees in which successful EAJA plaintiffs would be captives, so long as it put forth substantial justification arguments. Following the rule advocated by the government would violate this Court's admonition that "a 'request for attorney's fees should not result in

a second major litigation.'" Pierce v. Underwood, 108 S. Ct. 2541, 2549 (1988), quoting Hensley v. Eckerhart, 461 U.S. 424, 437 (1983).

A. The Statutory Language and Legislative History of EAJA Do Not Require A Separate Determination Whether The Government's Position In The Fee Litigation Was Substantially Justified.

1. The government's litigation position should not be examined in isolation.

In order to award fees under EAJA to a prevailing party, a court must determine whether the "position" of the government was substantially justified. Originally passed in 1981, EAJA was made permanent in 1985.[2] Among the amendments

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2. EAJA, which originally took effect on October 1, 1981, contained a "sunset provision" which caused the (continued...)



included in the permanent version of EAJA was a definition of the term "position of the United States" which now embraces not only the "position taken by the United States in the civil action", but also "the action or failure to act by the agency upon which the civil action is based". 28 U.S.C. §2412(d)(2)(D). For the legislative history of the 1985 amendments to EAJA see H.R. Rep. No. 99-120, Part I, 99th Cong., 1st Sess. 4,

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2.(...continued)
act to expire on September 30, 1984. On November 9, 1984, Congress passed a new version of EAJA, which made the act permanent and added certain amendments. The 1984 version of EAJA was vetoed by the President on November 9, 1984. See 1985 U.S. Code Cong. & Admin. News at 133-34. In 1985 Congress passed a new version of EAJA, which made the act permanent and made several amendments which took account of the reason for the President's veto. Id.

reprinted in 1985 U.S. Code Cong. & Admin. News 132.

The definition of "position of the United States" included by Congress in the 1985 version of EAJA, which explicitly incorporates the underlying agency action, clarifies a matter which had led to "much confusion as to the proper scope of an EAJA proceeding". 1985 U.S. Code Cong. & Admin. News at 140. The new definition indicates that Congress explicitly rejected the approach taken by some courts, which focussed not "on the unjustified government activity that formed the basis of the litigation," but unduly on the government's position in the litigation. Id.

The statutory definition, as well as its legislative history, make clear that



courts are not to focus on the government's litigation stance in isolation. Such a narrow focus would allow the government to

> insulate itself from fee liability simply by conceding error or settling, because such actions will always be deemed "reasonable" litigation positions, thereby having the effect of substantially justifying [the government's] position. Interpreting the EAJA so as to restrict its application to mere litigation arguments and not the underlying action which made the suit necessary, would remove the very incentive for careful agency action that Congress hoped to create in 1980 [in passing EAJA].

Id. at 141, citing Environmental Defense Fund v. Watt, 554 F. Supp. 36, 41 (E.D.N.Y. 1982) and National Resources Defense Council v. E.P.A., 703 F.2d 700, 710 (3rd Cir. 1983). It was the intent of Congress "to provide attorneys' fees

when an unjustifiable agency action forces litigation, and the agency then rides to avoid such liability by reasonable behavior during the litigation." 1985 U.S. Code & Cong. Admin. News at 180.

Petitioners' approach, which would require such a separate analysis of the fee phase of the litigation, is not only inconsistent with the language and legislative history of EAJA, but would also promote waste of judicial resources. Requiring a court to examine the justification for the government's opposition to fees at the fee stage of the litigation would be

> inappropriate in view of th[e] congressional mandate to look not at the government's litigation position, but rather at the underlying action that spawned the litigation in the



> first place. Were the government's litigation position the sole criterion for the award of fees, it might be justified to look at different phases of the litigation separately to determine whether the litigation position in each phase was "substantially justified". But since the litigation position is no longer the relevant criterion, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the victim of that unjustified action is entitled to all reasonable attorney's fees, including those incurred on the fee application.

Trichilo I, 823 F.2d at 708. See also Russell v. Heckler, 814 F.2d 148, 155 (3rd Cir. 1987); Haitian Refugee Center v. Meese, 791 F.2d 1489, 1500-01 (11th Cir.), vacated, 804 F.2d 1573 (11th Cir. 1986); Lee v. Johnson, 801 F.2d 115, 116 (3rd Cir. 1986) (Becker, J., dissenting); Powell v. Commissioner, 891 F.2d 1167,

1170 (5th Cir. 1990); Trichilo v. Secretary of Health and Human Services, 832 F.2d 743, 745 (2nd Cir. 1987) ("Trichilo II") ("[C]ongress has made clear that it is inappropriate to examine separate parts of the litigation to determine whether the government's position in each phase was justified.")[3]

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3. Petitioner's recitation (Br. at 14-16) of the principle that EAJA should be strictly construed because it is a waiver of sovereign immunity does not diminish the force of this interpretation of EAJA. As this Court noted in Ruckelshaus v. Sierra Club, 463 U.S. 680, 686 (1983), cited in Library of Congress v. Shaw, 478 U.S. 310, 318 (1986), the key inquiry in the case of statutes waiving sovereign immunity is whether "a fair reading of the language of the [statutory] section requires" the United States to be subject to suit. In Sierra Club, this Court noted that there must be "explicit language" in a statute waiving sovereign immunity in order to support a "truly radical depar-

(continued...)



2. Consideration of whether the government's fee position was substantially justified would contravene EAJA by requiring the court to make a separate evidentiary determination.

Requiring a court to analyze whether the government's position in the fee litigation was substantially justified would also contravene a provision of EAJA

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3.(...continued)
ture" from established practice. 463 U.S. at 685 n.7. Applying the principle enunciated in Sierra Club in the Shaw case, this Court rejected the argument that a successful EAJA fee applicant should be given interest on fee awards, because it found no language in EAJA to support a departure from the well established principle of the government's traditional immunity from interest. This case represents a much different situation than Library of Congress. Granting fees for fee litigation without making a separate inquiry into whether the government's position is substantially justified does not represent a "radical departure" from established principles, but instead is well supported by the statutory language.

which directs that the determination of whether the government's position was substantially justified should be made "on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought." 28 U.S.C. § 2412(d)(1)(B).

Congress added this provision in 1985 because of concerns expressed by the President in his veto of the 1984 version of EAJA. The President noted that one of the bases of his disapproval of the 1984 version of EAJA was that it required courts to make a separate evidentiary determination in order to decide whether the position of the United States was



substantially justified. He disapproved of this approach because it "would result in needless and wasteful litigation over what is supposed to be a subsidiary issue, the award of attorneys' fees, and would further burden the courts, which would have to hear the claims in each case not once, but twice." See Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814-15 (Nov. 8, 1984).

Congress, mindful of the President's veto of the 1984 version of the EAJA, included the present 28 U.S.C. §2412(d)(1)(B) in 1985 in order to "limit the determination of whether the position of the United States was substantially justified to the record (including the record with respect to the action or

failure to act by the agency upon which the adversary adjudication or civil action is based) which is made in the adversary adjudication or civil action for which fees and other expenses are sought." 1985 U.S. Code Cong. & Admin. News at 135.

Congress further noted that "the evaluation of the government's position will be straightforward, since the parties will have already aired the facts that led the agency to bring the action. No additional discovery of the government's position will be necessary, for EAJA petition purposes." Id. at 141, citing Dougherty v. Lehman, 711 F.2d 555, 561-62 (3rd Cir. 1983). See also L. Hill, "An Analysis and Explanation of the



Equal Access to Justice Act," 19 Ariz. St. L. J. 229, 237-41 (1987).

Under 28 U.S.C. §2412(d)(1)(B) a court's determination of whether the government's position is substantially justified requires only an examination of the record already developed in the proceedings. No additional discovery or evidentiary hearings are necessary. In contrast, if a court were to follow the approach urged by petitioners, it would be forced to undertake a protracted analysis of the position advanced by the government in the fee phase of the litigation. Such an inquiry would run afoul of EAJA because it would require a court to consider in isolation evidence concerning the fee litigation stance of the government.

To make such an inquiry in the present case the district court would need to determine whether the government's position in the fee litigation (as opposed to its position in the underlying litigation or in the agency action which gave rise to the litigation) was substantially justified. At a minimum, the court would need to consider the government's justification for opposing respondents' fees for their work before this Court on the appeal relating to the underlying action, and also to examine the government's justification for arguing that respondents failed to quantify the fees due to an increase in the cost of living and that certain matters, including the pro bono publico nature of the litigation, should



not have been included as factors enhancing respondents' fee award. (See Petitioners Br. at 19-20.) Such an analysis would violate EAJA and escalate the litigation over fees into a major litigation in itself.

### B. The Policies Embodied By EAJA Favor Awarding Fees For Fee Litigation Without Determining Whether The Government's Opposition to the Fee Was Substantially Justified.

Allowing prevailing parties an award of fees for fee litigation under EAJA is "consistent with the purpose of [fee-shifting] statutes to ease litigants' path in vindicating their legal rights." McDonald v. Secretary of Health and Human Services, 884 F.2d 1468, 1480 (1st Cir. 1989). See also Trichilo I, 823 F.2d at 707. Allowing those same parties to

recover reasonable fees for the fee litigation, without a separate inquiry into whether the government's position is substantially justified, also fulfills EAJA's purposes because such awards help equalize the respective resources of prevailing fee applicants and the government, and do not put EAJA fee applicants to the additional burden of becoming captive in ancillary proceedings concerning the stance of the government in the fee litigation.

Allowing the government to proliferate fee litigation while avoiding responsibility to pay fees therefor, after it has been determined that its position in the underlying action was not substantially justified, would dilute the remedial purposes of EAJA. "Since the



purpose of the EAJA is to remove counsel fees as an impediment to challenging unreasonable and unjustified governmental actions, where a governmental action has been shown to have been unjustified, there should be as little disincentive for plaintiffs to obtain attorney's fees as there is for them to challenge the action itself." Trichilo I 823 F.2d at 707.

The alternative approach urged by petitioners would undermine the purposes of EAJA and penalize successful EAJA fee litigants by requiring them to absorb the cost of fee litigation, unless the government's fee stance was determined to be not substantially justified. In dismissing arguments similar to those

advanced by petitioners herein, the Second Circuit noted that

> [t]he government asks us "to treat the EAJA application as part of counsel's cost of doing business." To do so, however, would leave it in the power of the government, which already had been unjustified in its actions toward plaintiff, to so raise the cost of plaintiff's counsel's "doing business" simply by strenuous resistance to all fee applications as to discourage or economically prevent a plaintiff from litigating against the government in the first place. We regard it as more consistent with the congressional purpose to treat plaintiff's fee application as part of the government's cost of taking positions that are not substantially justified.

Id. See also Haitian Refugee Center v. Meese, 791 F.2d at 1500 ("The remedial purpose of EAJA is best served by considering the totality of prelitigation and litigation circumstances in awarding fees."); Note, "Determining Fees For Fees



Under the Equal Access To Justice Act: Accomplishing the Act's Goals," 9 Cardozo L. Rev. 1091, 1112-14 (1988).

Not only would the approach espoused by petitioner undermine the salutary remedial purposes of EAJA, but it would also prolong and proliferate the litigation. As the District of Columbia Circuit noted in Cinciarelli v. Reagan, requiring "every victorious EAJA plaintiff to make a separate claim for fees for bringing the first EAJA suit, and permit[ting] the government to claim that its first EAJA defense was substantially justified on the merits" raises "the distinct possibility of an infinite regression of EAJA litigation." 729 F.2d at 810. This would violate this Court's instruction that "a 'request for attor-

ney's fees should not result in a second major litigation.'" Pierce v. Underwood, 108 S. Ct. at 2549.

A very heavy burden would be placed on parties such as respondents and on the many counsel and organizations, such as amici, who undertake public interest litigation, by the prospect of not being compensated for work on the fee application. Such a rule would also discourage many counsel from accepting cases challenging arbitrary government conduct. Counsel which typically take on such litigation have considerably less resources than the government and are very likely to be harmed by prolonged litigation over fee matters. In contrast, the government has much to gain and little to lose from extending such



litigation. As Justice Brennan noted in the similar context of fees for civil rights litigation:

> Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. Defendants -- who generally have deeper pockets than plaintiffs or their lawyers, and whose own lawyers may well be salaried and thus have lower opportunity costs than plaintiffs' counsel -- have much to gain simply by dragging out litigation. The longer litigation proceeds, with no prospect of improved results, the more pressure plaintiffs and their attorneys may feel to compromise their claims or simply to give up.

Hensley v. Eckerhart, 461 U.S. 455-56 (Brennan, J., concurring in part and dissenting in part).

The government's assertion (Br. at 29-30) that there is no real possibility of such prolonged wrangling over fees is belied by the circumstances of this case, where the fee litigation has already lasted seven years. Requiring counsel to undergo yet another round of litigation would discourage many from undertaking the representation of plaintiffs in similar public interest litigation. As the district court noted below, counsel typically undertake public interest litigation such as this not merely to "vindicate [plaintiffs'] rights to fair process and equal treatment", but also to "vindicate . . . important public interests." Louis v. Nelson, 646 F. Supp. 1300, 1317-18 (S.D.Fla. 1986). Such purposes are squarely within the



ambit of EAJA and should not be undermined by requiring counsel to face and possibly to fund unending squabbles over fee matters.

II

## CONCLUSION

The Court should affirm the decision of the Court of Appeals in this case and adopt a rule which would allow successful EAJA fee applicants to obtain fees for fee litigation without having to face the additional hurdle of an inquiry into whether the government's position in the fee litigation was substantially justified.

Respectfully submitted,

ROBERT L. KING
Counsel of Record

Debevoise & Plimpton
333 South Grand Avenue
Suite 5150
Los Angeles, California 90071

TIMOTHY J. TOOHEY
NIELS W. FRENZEN

(8)

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No. 89-691

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
*Petitioners,*

*v.*

MARIE LUCIE JEAN, ET AL.,
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

## BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

Lawrence H. Rudnick
STEEL, RUBIN & RUDNICK
936 Public Ledger Bldg.
Philadelphia, PA 19106
(215) 922-1181

*Counsel for Amicus Curiae*

PACKARD PRESS / LEGAL DIVISION, 1017 L.F.S. BOULEVARD, PHILA., PA. 19103 (215) 893-0000

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No. 89-601

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1989

COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE, ET AL.,
*Petitioners,*

*v.*

MARIE LUCIE JEAN, ET AL.,
*Respondents.*

On Writ of Certiorari to the
United States Court of Appeals for the
Eleventh Circuit

# BRIEF AMICUS CURIAE OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

## STATEMENT OF INTERESTS

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION is a national association of practicing lawyers and law school professors who practice and teach in the fields of immigration and nationality law. AILA has as its objectives, to advance the administration

of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto, and to facilitate the administration of justice therein; and to evaluate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration, nationality and naturalization matters.

The membership of amicus practice regularly before the Immigration and Naturalization Service (hereinafter INS) in all of its districts nationwide, including all district levels of the Executive Office for Immigration Review (hereinafter EOIR), and the Board of Immigration Appeals; amici appear as well before the federal district courts and federal circuit courts of appeal of the United States, and have argued matters of immigration, nationality, and naturalization before the Supreme Court of the United States.

AILA has a direct and serious interest in the development of the immigration law and in the case now before this Court. The issue upon which the court has granted *certiorari* directly involves the practice of immigration law and the interest of AILA's members. Whether immigration practitioners will be able to recover attorney's fees in actions brought against the federal government or in defending actions brought by the federal government, is of direct interest to AILA's membership.

The familiarity of amicus with the nature of the proceedings involved, and the public interest at stake lead amicus to believe the court would benefit from additional legal argument and interpretation with respect to the substantive question of law here at issue.

## SUMMARY OF ARGUMENT

The government should not be permitted to defend against an award of fees under EAJA solely on the basis that its position in the fee litigation was substantially justified. The decision of the 11th Circuit Court of Appeals furthered Congressional intent in reducing the deterrent effect of litigating against the federal government. The decision not to permit the defense of substantial justification for the fee litigation is in accord with the statutory language defining the "position of the United States". 28 U.S.C. §2412(d)(2)(D).

The holding of the 11th Circuit Court of Appeals furthers the interest of judicial economy in preventing a second major litigation on the fee issue. The government's position to allow as a defense of substantial justification in the request for fees for litigating the amount of fees both increases the deterrent effect of litigating with the government and creates a second major piece of litigation. Further, it creates the possibility of an "infinite regression" of litigation to determine whether the government's position in the prior litigation was substantially justified.

The government may still object to fee awards on the basis that the claimed number of hours are excessive or the hourly rates are not in accordance with the statute. Further, the government may have available to it certain "technical defenses".



## ARGUMENT

### THE GOVERNMENT SHOULD NOT BE PERMITTED TO DEFEND AGAINST A REQUEST FOR FEES UNDER EAJA SOLELY ON THE BASIS THAT ITS POSITION IN THE FEE LITIGATION WAS SUBSTANTIALLY JUSTIFIED.

28 U.S.C. §2412(d)(2)(D) defines the position of the United States. This provision was added by the 1985 amendments to make clear Congress' intention that the government's substantial justification defense would be sustained only by showing that the position of the agency which caused the litigation was reasonable and that the government's litigation position was reasonable.

This provision provides strong support for the proposition that Congress did not intend that the government would be able to defend against a request for compensation for the time spent in litigating the fee dispute solely on the basis that its litigation of the fee dispute issue was substantially justified. *Trichilo v. Secretary of Health & Human Services*, 823 F.2d 702, 707-708 (2d Cir. 1987).

The government argues that Congress intended that the fee litigation be treated as a "separate phase of the case". Therefore, the substantial justification defense permitted on the issue of the availability of fees should be permitted with regard to the fee litigation. See Brief for Petitioner, pages 17-18.

It is unlikely that Congress intended such a result. The government's attempt to impute to Congress an intention to create a second major piece of litigation is unavailing. Certainly, it is not supported by the express language of the statute.

The government further argues that Congress established a balance in awarding fees between an automatic fee shifting provision and one which would only allow for fee shifting where the government's position was frivolous. Brief for Petitioner, pages 18-19. This argument ignores that the government had the substantial justification defense available to it in defending the fee petition. Only by artificially bifurcating the proceedings into a separate litigation for fees, is the government able to make this argument. As set forth above, it is unlikely that Congress intended such a result, particularly in light of their definition of the "position of the United States". As the United States Court of Appeals for the Second Circuit stated:

> But since the litigation is no longer the relevant criteria, there is no reason to divide up phases of the litigation for examination. In short, if the underlying agency action was not substantially justified, the



> victim of the unjustified action is entitled to all reasonable attorneys fees, including those incurred on the fee application.

*Trichilo v. Secretary of Health and Human Services*, 823 F. 2d 702, 708 (2d Cir. 1987) (citations omitted).

Even more compelling than the statutory language is the effect of the government's position on the stated purpose of the EAJA. Congress expressed the purpose of EAJA as:

> (1) To diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorneys fees, expert witness fees, and other costs against the United States;

§202 of Pub. Law 96-481, reprinted as a note to 5 U.S.C. §504 in the United States Code Annotated (1989 cummulative annual pocket part).

The effect of the government's position would be to substantially increase the deterrent effect of litigating against the government, precisely contrary to the central purpose of EAJA.

This case, like *Pierce v. Underwood*, 108 S.Ct. 2541, 2549 (1988), involves the exceptional case of litigation involving a substantial amount of fees. Typically, EAJA cases involve much smaller awards. This is particularly so in the immigration context. Most immigration law proceedings are administrative proceedings held before immigration judges and the Immigration Service. These proceedings generally do not involve a sufficient number of hours and hence a sufficient amount of fees to justify extensive litigation as to the amount of fees to be awarded. Permitting the substantial justification defense as to the fee litigation will substantially increase the deterrent effect in representing individuals in small cases.

It should be noted that fees are already capped by the statute at $75 per hour, adjusted for inflation in most cases. *Pierce v. Underwood*, 108 S.Ct. at 2553. Congress has already struck a balance by limiting the hourly rates and permitting the government the defense of substantial justification on the merits. An additional defense permitting the government a second crack at substantial justification would often defeat the purpose of EAJA, to permit an individual of modest means to litigate against the government.

The balance struck by Congress would be substantially disturbed by the government's position. Members of AILA would be significantly deterred from taking on litigation with the government where they know that fees can be recovered not only when the government's position was not substantially justified, but also where the government would be able to drag out fee proceedings and avoid compensating counsel by the defense of substantial justification in the fee litigation.

The facts of *Trichilo v. Secretary of Health and Human Services*, 823 F.2d at 707 are illustrative. In *Trichilo*, the fee applicant requested compensation for 42.1 hours for litigating the case on the merits and 13.1 hours spent in the fee litigation. Were the government to prevail in its argument against the award of compensation for time spent in the fee litigation, the compensation would be reduced by nearly 25 percent. The deterrent effect of this result is evident.

A considerable body of law has developed in the Courts of Appeals finding that the government's ability to raise the substantial justification defense in the fee litigation would substantially undermine the ability of individuals to obtain counsel to litigate against the government. See *Jean v. Nelson*, 863 F.2d 759, 778-780 (11th Cir. 1988); *Trichilo v. Secretary of Health and Human Services*, 823 F.2d 702, 707-708 (2d Cir. 1987);



*McDonald v. the Secretary of Health and Human Services*, 889 F.2d 1468, 1480 (1st Cir. 1989); and *Powell v. Commissioner of Internal Revenue Service*, 891 F.2d 1167, 1171 (5th Cir. 1990). Thus, there exists a widely held view that the government's position would deter the acceptance by counsel of cases litigating against the federal government, thus undermining the central purpose of EAJA.

There is also the issue of judicial economy to consider. This court has warned on several occasions against the creation of a second major piece of litigation to determine counsel fees. *Pierce v. Underwood*, 108 S.Ct. at 2549, citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1988). The government's position in attempting to create a second major litigation undermines these principles. Refusing to permit the government the substantial justification defense will lead to more prompt resolution of fee applications. Further, it will be an unusual case where the government will be able to establish that its litigation position in defending unreasonable conduct was itself reasonable. *Russell v. Heckler*, 814 F.2d 148, 155 (3rd Cir. 1987) vacated on other grounds, 108 S.Ct. 2891 (1988).

There may be close cases on the question of reasonableness of the government's position on the merits, in which permitting the government the substantial justification defense in the fee litigation could be of significance. More often, it will simply be a waste of judicial resources. Moreover, the government's position permits it to engage in an "infinite regression" of litigation as to substantial justification. See *Cinciarelli v. Reagan*, 729 F.2d 801, 810 (DC Cir. 1984). Although the government disclaims such an intention, Petitioner's Brief at 29-30, the possibility of wearing down the fee claimant by repeated litigation is certainly made available to the government by its position.

The government argues that it would be exposed to excessive and unreasonable attorneys fee claims if it is

stripped of the substantial justification defense as to fees for the fee litigation. This argument ignores the statutory limitation to a "reasonable" fee. The holding of the 11th Circuit Court of Appeals in this case and the decisions of other courts demonstrate the fallacy in the government's argument.

In the matter before the Court, the 11th Circuit Court of Appeals reserved the question as to whether a "technical defense" exception should exist. *Jean v. Nelson*, 863 F.2d at 780 n14. None of the decisions adopting the "automatic fee shifting" rule substantiate the government's claim. To the contrary, all of the decisions limit fee recovery to reasonable fees. The decisions cited above are not inconsistent with the recognition of the "technical defenses" position adopted in *American Academy of Pediatrics v. Bowen*, 795 F.2d 211 (DC Cir. 1986) and apparently adopted in *Russell v. Heckler*, 814 F.2d 148, 145 (3rd Cir. 1987), vacated on other grounds, 108 S.Ct. 2891 (1988). The decisions of the four circuits cited above merely hold that the government does not have available to it the defense of substantial justification as a defense to the claim for fees for litigating the availability and amount of fees.

It should be noted that this case does not raise the issue of the "technical defenses" exception. The government never raised the issue before the Court of Appeals and the facts of the case do not implicate that theory. The government's claim that it would be left defenseless to unreasonable fee petitions because of the absence of the substantial justification defense is without merit.

As well stated by Judge Becker, the result reached by the 11th Circuit "... not only follows from the doctrines surrounding EAJA fee awards, it also makes sense". *Lee v. Johnson*, 801 F.2d 117 (3rd Cir. 1986) (statements sur denial of Petition for Rehearing). The rule suggested by the government is contrary to the



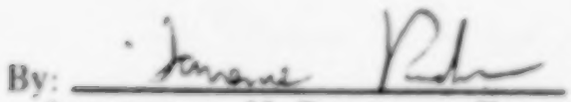
purposes of EAJA and creates another issue which would have to be resolved through another round of litigation. Moreover, the position of the government would often leave litigants against the government with "... a lifeline that was a foot short". *Sullivan v. Hudson*, 109 S.Ct. 2248, 2256 (1989). Congress should not be imputed with an intention to have created a system for fee compensation that leaves a fee litigant substantially deterred from ever accepting the case on the merits.

## CONCLUSION

Amicus AMERICAN IMMIGRATION LAWYERS ASSOCIATION urge that the judgment of the United States Court of Appeals for the 11th Circuit be affirmed.

Respectfully submitted,

AMERCIAN IMMIGRATION
LAWYERS ASSOC.

By: 
LAWRENCE H. RUDNICK, ESQ.

**CERTIFICATE OF SERVICE**

I, Lawrence H. Rudnick, Esquire, do hereby certify that a true and correct copy of the attached Brief Amicus Curiae were served upon the following:

Kenneth W. Starr, Solicitor General, at the Office of the Solicitor General, Washington, DC 20530; and Ira Kurzban, Esq. at Plaza 2650, 2650 S.W. 27th Avenue, 2nd Floor, Miami, FL 33133 by first class mail postage prepaid.

April 5, 1990
DATE

LAWRENCE H. RUDNICK

STEEL, RUBIN & RUDNICK
936 Public Ledger Building
6th & Chestnut Street
Philadelphia, PA 19106